No. 80-2071

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In The

Supreme Court of the United States

October Term, 1980

ROSLINDALE COOPERATIVE BANK, *et al.*,

Petitioners,

vs.

CAROL S. GREENWALD, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

1. Whether the district court must exercise its jurisdiction?

2. Whether the Supreme Judicial Court, the district court, and the appellate court have granted the respondents defenses that the respondents did not plead, contrary to F.R. Civ. Proc. Rules 8(c) and 56(e)?

3. Whether the petitioners have pleaded specific facts which must be taken by the court as true, and therefore it is the petitioners who are entitled to summary judgment?

4. Whether the district court has aided the respondents to continue the violations of the petitioners' rights by failing to grant timely orders to enable the petitioners to obtain judicial due process in either state or federal courts?

5. Are M.G.L. c. 170 App. 2, §§4 and 5, and M.G.L. c. 167, §5 unconstitutional on their face; or at least unconstitutional without rules and regulations, and/or as used by the respondents against the petitioners?

6. Whether the M.G.L. c. 167, §5 hearing was conducted by a "judge" who was biased as a matter of law, and the hearing procedures violated the petitioners' (four) constitutional rights of due process?

LIST OF PARTIES

All of the parties are not in the caption of the case and are therefore listed in the footnote below.[1]

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1. Petitioners:

A. Roslindale Cooperative Bank of Boston, Mass.

(1) The Roslindale Bank as a corporation;

(2) The shareholders of the Roslindale Bank.

B. Directors who have not been charged by any notice of any proceeding as individuals, but who were *de facto* removed on October 28, 1977.

(1) Six directors who were elected and holding office on October 28, 1977, and who have been *de facto* removed since then:

(a) Benedetto Faletra;

(b) Harold T. Hourihan;

(c) Charles Jannotta;

(d) Dr. Joseph Marcantonio;

(e) James J. Rock; and

(f) Charles W. Wiggins.

(2) One director who was not in office on October 28, 1977, and who has been *de facto* not allowed to serve: Dr. H. Thomas O'Hara.

C. Four directors who were in office on October 28, 1977, and who were *de facto* removed along with all of the other directors on October 29, 1977.

These four directors received notice of charges over one year later on November 1, 1978. They were then "purportedly" *de jure* removed on January 4, 1979. The petitioners claim that this *de jure* removal can never be established lawfully because the respondent Greenwald refused to appoint a clerk, so that the petitioenrs could summon records, this refusal contrary to M.G.L. c. 66 §6 procedures, results in no lawfully-made record of the M.G.L. c. 167, §5 hearing.

(Cont'd)

(Cont'd)

(1) Leonard F. DeLosh;

(2) James M. Quinn;

(3) Albert G. Tobin; and

(4) Robert H. Tobin.

D. One director who was in office on October 28, 1977 and who subsequently resigned to avoid charges and impairing his failing health: Orest Falcione

Respondents:

A. The former Commissioner of Banks, Carol S. Greenwald whose term of office has expired on January 4, 1979, being sued in her official capacity and as an individual.

B. The present Commissioner of Banks, Gerald T. Mulligan, is being sued in his official capacity.

C. The Deputy Commissioner of Banks, Edward Flynn, who has been Deputy Commissioner under Greenwald and Mulligan, and who is being sued in his official capacity and as an individual.

D. Cooperative Central Bank.

E. The Executive Officer of Cooperative Central Bank and its fifteen directors, who are being sued in their official capacities, and also as individuals:

(1) Sydney Dunn, President;

(2) Earle C. Harvey, Vice-President;

(3) George Sutton, Clerk;

(4) James L. Burns, Executive Vice-President;

(5) Harold S. Adams;

(6) Robert F. Currie;

(7) Alexander J. Guittan;

(Cont'd

(8) Charles W. Hickson;

(9) Joseph W. Higgins;

(10) Felix A. Kulick;

(11) Francis M. Metterville;

(12) Joseph C. Murray;

(13) William D. Palmer;

(14) Everett P. Pope;

(15) John G. Wallwork;

(16) Henry S. Thompson; and

(17) James G. Perkins, Jr.

F. The Board created under M.G.L. c. 167, §5, who are being sued in their official capacity, consisting of:

(1) Attorney General;

(2) The State Treasurer; and

(3) The Commissioner of Revenue.

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No.

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Petitioners,

vs.

CAROL S. GREENWALD, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

OPINIONS BELOW

1. Denial of petitioners' motion to recall mandate dated January 30, 1981 and denied by the appellate court on February 11, 1981 (*see* Appendix A and B, *infra*, 1a-4a).

2. *Roslindale Cooperative Bank v. Greenwald*, No. 80-1280, ___ F. 2d ___ (January 8, 1981) hereinafter called *Roslindale III (see* Appendix C, 5a-10a).

3. *Roslindale Cooperative Bank v. Greenwald*, No. 78-111-Z (March 25, 1980) hereinafter called *Roslindale II (see* Appendix D, 11a-14a).

4. *Roslindale Cooperative Bank v. Greenwald*, 481 F. Supp. 749 (December 7, 1979) hereinafter called *Roslindale I (see* Appendix E, 15a-28a).

5. *Tobin v. Commissioner of Banks*, 1979 A.S. 498, 380 N.E. 2d 1248 (February 28, 1979) hereinafter called *Tobin (see* Appendix F, 29a-33a).

STATEMENT AS TO JURISDICTION

I. This is a petition for review of a decision of the District Court of Massachusetts, for a complaint brought under the authority of 28 U.S.C. §§1331, 1343 (*i.e.*, 42 U.S.C. §§1983, 1985, 1986) and 28 U.S.C. §2201, by a financially sound bank, its shareholders and directors, acting both as a collective board in their official capacity, and as individuals. The financially sound bank was "seized" and its directors and shareholders' rights to control its possessions were "removed" by the Commissioner of Banks by the unauthorized use of a "liquidation statute" which appointed the respondent Central Bank, "a statutory administrative receiver" for liquidation purposes. Neither the bank nor its officers have yet to receive administrative notice of charges or a hearing after over three years from October 28, 1977, and the petitioner bank has not been "liquidated" but has been continued in business by the administrative statutory receiver, Central Bank.

The petitioners say that the Supreme Judicial Court of Massachusetts has decided a federal question which conflicts with the decision of the First Circuit Court of Appeals and with decisions of other circuit courts of appeal and also with decisions of the Supreme Court of the United States.

The petitioners say that the First Circuit Court of Appeals has decided a federal question, which conflicts with the decision of the Supreme Judicial Court of Massachusetts, other circuit courts, and also with decisions of the Supreme Court of the United States.

The petitioners further say that the Supreme Judicial Court of Massachusetts, the First Circuit Court of Appeals,

have decided an important question of law which apparently has not been, but apparently should be settled by the Supreme Court of the United States. Both decisions not only conflict with each other but also conflict with applicable decisions of the Supreme Court of the United States.

The petitioners say the gravamen of their complaint is that they have been denied by the respondent administrators as required by both constitutional law, and the statutes of Massachusetts, as well as regulations of the Division of Banks, "prior notice of charges" (or arguing in the alternative), "post prompt" notice of charges, as well as the other requisites of due process; an administrative confrontation hearing with a record of findings of fact and law that a court can review; as well as rights of review and appeal. The petitioners say no administrative hearing at this late date can correct these constitutionally required deficiencies of procedure within the time frame set by *Armstrong v. Manzio,* 380 U.S. 545 and *Fuentes v. Shevin,* 407 U.S. 67 (1972).

The petitioners say that the confusion in the decisions of the district court, the appellate court and the Supreme Judicial Court relative to the Doctrines of Primary Resort, Primary Jurisdiction, and Exhaustion of Administrative Remedies, in this case, has had a total effect worse than the Doctrine of Abstention; for at least in abstention, the court stays the action. *See Am. Trial Lawyers Assoc. v. N.J. Sup. Ct.,* 409 U.S. 467 (1973). It is to be noted that the district court refused a motion copied exactly from *American Trial Lawyers, supra.* Thus the petitioners have been subject to "unfettered freedom" of administrators, who have continued to refuse the petitioners administrative due process, over any issue, and who have continued to do so for over three years, without court intervention, and there still remains no record that any court can review of any of the respondents' adjudications.

To further explain the petitioners' difficulties, the District Court of Massachusetts and the First Circuit Court of Appeals have, in fact, extended the doctrines to state that the petitioners must use available State Judicial Declaratory

Judgment Procedures, M.G.L. c. 231A, contrary to the Supreme Court decision of *Monroe v. Pape*, 365 U.S. 167 (1961) as elaborated by *McNeese v. Board of Education*, 373 U.S. 668 (1963) and as recently elaborated in *Allen v. McCurry*, ____U.S. ____, 66 L. Ed. 2d 308, Sl. Dec. 79-935 (Dec. 9, 1980).

The conflict of decisions between the various circuit courts on the Exhaustion Doctrine is set forth very clearly in *Swan v. Stoneman*, 634 F. 2d 97 (2d Cir. 1980).[2]

The petitioners say that the Supreme Judicial Court allowed a dismissal of the petitioners' complaint under M.R.C.P. Rule 12(b)(6), because the petitioners failed to exhaust administrative remedies, which were not offered by the agency and which did not exist. The Supreme Judicial Court, *sua sponte*, allowed this affirmative defense which the respondents did not raise by pleadings. *See Central Motors v. City of Pepper*, 63 Ohio App.

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2. *Swan v. Stoneman*, 634 F. 2d 97 (2nd Cir. 1980) at p. 103:

> "The law is less clear, however with respect to exhaustion of state administrative remedies. The language of a number of Supreme Court decisions suggest that state administrative remedies, like state judicial remedies, need not be exhausted prior to commencement of a federal civil rights suit. See e.g. *Ellis v. Dyson* supra; *Steffel v. Thompson*, 415 U.S. 452, 472-473, *Carter v. Stanton*, 405 U.S. 669, 671 (1972); *Houghton v. Shafer*, 392 U.S. 639, 640 (1968); *King v. Smith*, 392 U.S. 309, 312 n4 (1968) *Damico v. California*, 389 U.S. 416, 417 (1967). Several courts have interpreted these decisions as laying down a flat rule that exhaustion of administrative remedies is not required in such cases. See e.g. *Green v. Ten Eyck*, 572 F.2nd 1233, 1239-40 (8th Cir. 1978); *McCray v. Bunell*, 516 F.2nd 357, 361-365 (4th Cir. 1975) en banc cert. granted 423 U.S. 923 (1975) cert dismissed, 426 U.S. 471 (1976); *Hawkins v. Town of Shaw*, 461 F.2nd 1171, 1176 (5th Cir. 1972) (en banc)."

> ". . . We have held that before relinquishing its 1983 jurisdiction, a federal court must be 'positively assured' — it may not presume — that there are speedy, sufficient, and readily available administrative remedies remaining open to pursue."

Ct. 2d 34, 409 N.E. 2d 258 (1980). The court also looked to the petitioners' pleadings for authority contrary to Rule 9. The respondents had not pleaded that *Tobin* had no authority.

In spite of *Gomez v. Toledo,* Sl. Dec. 79-5601, ____ U.S. ____, 64 L. Ed. 2d 572, 100 S. Ct. 2__ (1980) which overruled *Gomez v. Toledo,* 602 F. 2d 1018, and which the district court cited in its decision (*see* 481 F. Supp. at 755, par. 19). The First Circuit is still granting the respondents affirmative defenses that they have neither pleaded by answer or raised by affidavits, such as immunities and the Exhaustion Doctrine, which are both affirmative defenses which must be pleaded. *See* F.R.C.P. Rule 8(c).

The petitioners say that both the First Circuit Court of Appeals and the district court decisions in effect, deny the Roslindale Bank due process of law, because they refuse the petitioners federal jurisdiction and also because they will not and have not in the past, ordered the respondents to give to the petitioner bank sufficient funds of its own money, which they hold in their possession adversely, to enable the petitioner bank to hire independent knowledgeable counsel, and/or pay the costs of court necessary to obtain discovery.

The district court and the First Circuit Court of Appeals also have refused the petitioners protective orders that would protect the petitioners' First Amendment rights to obtain "public records" for court procedure. The district court also refused to order the respondents to appoint a clerk to certify "public records" or the "lack of public records" to enable the petitioners to meet the requirements of F.R.C.P. Rule 44 (similar to Mass. R.C.P. Rule 44) or F.R.C.P. Rule 56(e) [similar to Mass. R.C.P. 56(e)], which the petitioners need to receive due process in either federal or state courts. The petitioners say that since *Richmond Newspapers v. Va.,* ____ U.S. ____, Sl. Dec. 79-243 (July 2, 1980) they have a First Amendment right to gather information from the state respondents for the purposes of obtaining judicial due process, as well as a right to an "open trial" in administrative decisions that effect their constitutional rights, or at least a right to an "open trial" post promptly or at least a "closed" hearing "post promptly".

II. The dates of entry of the last order denied by the First Circuit Court of Appeals is February 11, 1981. The motion denied by the order is set forth as Appendix B at page 2a. The order is set forth as Appendix A at page 1a. The amended decision sought to be reviewed is dated January 8, 1981 and is set forth in Appendix C at page 5a. This Court (Brennan, J.) on April 7, 1980 granted petitioners' motion for an extension of time until June 7, 1981.

III. The statute that confers jurisdiction on this Court for a petition for a writ of certiorari is 28 U.S.C. §1254.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The basic constitutional issue involved is the Fourteenth Amendment's right to due process as elaborated by the other amendments.[3]

The petitioners also claim the equal protection of statutory entitlements to procedural and substantive statutes that were enacted by the Legislature to ensure that constitutional required procedures were not violated by Massachusetts administrators when dealing with its citizens' constitutional rights.

The petitioners have pleaded that the respondents have massively ignored and intentionally continue to violate the following statutes: The Administrative Procedures Act; M.G.L. c. 30A; M.G.L. c. 66; The Public Records Law; M.G.L. c. 66A; The Fair Information Practices Act. All of, which similar to their federal counterparts, are known and settled laws and have known and settled court decisions, as well as the published regulations of the Commissioner of Banks.

The petitioners say they are entitled by federal minimum timely notice of charges and a hearing. *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Armstrong v. Manzio*, 380 U.S. 545 and they are also entitled to prior notice by M.G.L. c. 30A, §11A½ of "48

3. Fourteenth Amendment (in pertinent part) can be found in the appendix at p. 39a.

hours" notice,[4] and by M.G.L. c. 30A §11 of reasonable notice,[5] and by the Regulations of the Division of Banks of "ten days notice".[6]

The petitioners also say that since *Richmond Newspapers v. Virginia*, ____ U.S. ____, Sl. Op. 79-243 (1980), they have been entitled to a First Amendment right to public records, especially if these records are designed to be made to obtain judicial due process and this is a guaranteed Fourteenth Amendment right. However, the petitioners also say they were granted procedural entitlements by M.G.L. c. 30A, §11A½[7] and M.G.L. c. 66, §5A[8] and §6[9] and the Regulations of the Commissioner of Banks.[10]

The petitioners say that because the administrative bodies have primary jurisdiction and the court has only the right of review, the court is limited by F.R.C.P. Rule 44, to the administrative record. M.G.L. c. 30A, certiorari and M.G.L. c. 231A give the court only secondary jurisdiction. As there was no clerk appointed, or no record in anyone's custody, any other evidence as to the administrative hearings is barred by the parol evidence rule. *N.E. Box Co. v. C & R Const. Co.*, 313 Mass. 698, 49 N.E. 2d 121 (1943).[11]

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4. *See* appendix, *infra* at p. 39a.

5. *See* appendix, *infra* at p. 40a.

6. *See* appendix, *infra* at p. 41a.

7. *See* appendix, *infra* at p. 39a.

8. *See* appendix, *infra* at p. 40a.

9. *See* appendix, *infra* at p. 40a.

10. *See* appendix, *infra* at p. 41a.

11. *N.E. Box Co. v. C & R Const. Co.*, 313 Mass. 698, 49 N.E. 2d 121 (1943) at 127 N.E.:

> "The provisions of section 6 of c. 66, to the effect that all votes, orders, and proceedings shall be entered is

(Cont'd)

The parol evidence rule is not one merely of evidence but is a rule of substantive law. *Suburban Land Co. v. Billerica,* 314 Mass. 184, 49 N.E. 2d 1013, 1016 (1943); 147 A.L.R. 660.[12]

The petitioners also say that they have a "liberty right" to privacy and to enjoy their statutory entitlement to be bankers and that the stigmatization cast upon them gave right to an immediate name-clearing hearing. *Owens v. City of Ind., Mo.,* ___ U.S. ___, Sl. Op. 78-1779 (1980); but the petitioners under M.G.L. c. 214, §1B,[13] and §3B[14] were given the right of privacy and M.G.L. c. 66A, The Fair Information Practice Act, gives the petitioners rights in the same vein but beyond the right of privacy.[14] *See Swartz v. Dep't of Banking and Insurance,* ___ Mass. ___, 382 N.E. 2d 1050 (1978).

The petitioners also claim the equal protection of special statutory entitlements to procedures that the Legislature enacted for the protection of banks and bankers, which the respondents violated. M.G.L. c. 167, §2[15] sets forth procedures to be used for

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(Cont'd)

> sweeping. It is not confined merely to votes of a public board, but includes also its orders and proceedings. The obvious purpose of the section is to require that a public board record of the proceeding shall be kept and it must have been intended that a record so kept should constitute a public record. We find nothing in the cases where the provisions that suggest any other conclusion . . . As already pointed out, the general rule forbids proof of acts of boards by any other evidence other than a record."

12. *Suburban Land Co. v. Billerica,* 314 Mass. 184, 49 N.E. at 1016:

> "It is settled, as the plaintiffs correctly contend, that the records of a town clerk, as of any public body are not open to addition, contradiction, or variation by parol evidence. . . ."

13. *See* appendix, *infra* at p. 41a.

14. *See* appendix, *infra* at p. 41a.

15. *See* appendix, *infra* at p. 40a.

the determination of the value of a bank's real estate mortgage portfolio which requires prior notice and a "certified real estate appraiser".

The petitioners also claim that M.G.L. c. 167, §5[16] sets forth procedures to be used for the removal of bank officers which entitle the petitioners to prior notice and procedures before being removed. *See Tobin v. Greenwald, supra,* p. 1248. The petitioner directors and individuals were removed on October 28, 1977 and their constitutional rights diminished. Four directors received notice "not post promptly", (one year later) on November 1, 1978. Eight directors have never received any notice at all.

The petitioners also claim the equal protection of "regulatory entitlements" of prior notice and procedure in published regulations of the Division of Banks entitled "Regulations established in and in accordance with and under the authority of section 9 of chapter 30A" (*i.e.,* Administrative Procedures Act) of the General Laws Governing the Conduct of Adjudicatory Proceedings Before the Commissioner of Banks, Department of Banking and Insurance, Division of Banks and Loan Agencies.[17]

One of the petitioners' basic claims is for political reasons, the respondent Greenwald maliciously misused the authority of M.G.L. c. 170, App. 2, §4[18] and "certified" that the Roslindale Bank was "unsafe" and "inexpedient to continue in business", when it was neither "unsafe" and three years later, it is still in business. The petitioners have also pled that she had no intention to order the bank liquidated.

The petitioners say the respondent deliberately misused M.G.L. c. 170, App. 2, §4 to deliberately avoid giving the petitioner bank's directors and officers the due process of

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16. M.G.L. c. 167, §5 is in full text in the appendix as it appeared in 1977.

17. *See* footnote 10.

18. M.G.L. c. 170, App. 2, §4 is found in the appendix in full text, as it appeared in 1977 at p. 35a.

M.G.L. c. 167, §5; the officers removal statute to administratively merge the petitioner individuals out of office; and also to diminish the shareholders of Roslindale rights by merging the shareholders with a larger bank whose voting offices would not be in the Roslindale Bank's geographical district.

Another important aspect of the petitioners' complaint is that M.G.L. c. 170, App. 2, §4, appoints Central Bank as an "administrative statutory receiver" and M.G.L. c. 170, App. 2, §5,[19] provides for return of the petitioner bank by Central Bank with the approval of the Commissioner. The respondent Central Bank resumed the petitioner bank's business immediately without turning it back. They continued to resume the business even after they, themselves, decided, *ex parte*, at least on April 25, 1978, that the bank could not be liquidated. They have ignored the Supreme Judicial Court's decision of February 28, 1979, which stated that *Vigilante v. Old South Church,* 251 Mass. 385, 146 N.E. 670 (1925) applies to all (Roslindale) bank's business. *Vigilante* states that even the Commissioner cannot appoint an agent to resume the business, "Great abuse might result if he were allowed so to do. . . ."

At the time of the certification, there were no rules and regulations enacted by the Commissioner of Banks as described in M.G.L. c. 170, App. 2, §4[20], or by Central Bank as described

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19. M.G.L. c. 170, App. 2, §5 is found in full text in the appendix at p. 36a.

> "At any time after the corporation has taken over control . . . it may with approval of the Commissioner turn back control . . . to such member bank which may resume business free from any control by the corporation . . . subject to such conditions as the commissioner may impose. . . ."

20. M.G.L. c. 170, App. 2, §4 is in full text in the appendix at p. 35a.

> ". . . and shall operate such bank subject to such rules and regulations as the commissioner may impose until the bank shall resume business or until its affairs shall be finally liquidated."

in M.G.L. c. 170, App. 2, §8,[21] to give the statute definition and limit "overbreadth", or "unfettered freedom", or arbitrary discretion, regarding the operation of or the return of the Roslindale Bank's assets and control.

STATEMENT OF THE FACTS

It seems inconceivable to the petitioners, that any court would allow a sound bank to be "seized" for over three years, knowing there has been no notice of charges, and no administrative hearing regarding the seizure, or why the receiver continues to keep the assets.

These facts alone are proof of irreparable harm as a matter of law.

The Supreme Court of the United States during a time of war would not allow the President of the United States to seize a steel mill manufacturing essential war materials and declared in that case that a governmental seizure of private property was, as a matter of law, irreparable harm. *See Youngstown Sheet and Tube Co. v. Sawyer,* 343 U.S. 579 at 585-586 (1952). The Roslindale Bank is the last community bank in Roslindale. This unwarranted governmental seizure for political purposes is of great concern to the depositors as well as the whole banking industry in Massachusetts who have suffered from the "activist" political Bank Commissioner Greenwald. Note Rule 18 of the United States Supreme Court Rules cites *Youngstown Sheet and Tube, supra.* The petitioners state this case lies within the principles set forth in that case.

The facts as pleaded in a verified complaint, *see Pupecki v. James Madison Corp.,* Mass. A.S. 2340, 382 N.E.2d 1030 at

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21. M.G.L. c. 170, App. 2, §8:

> "The directors of the corporation may make such rules and regulations, subject to the approval of the commissioner, as they may deem necessary in order to carry out the provisions of this chapter, and for such purposes the commissioner may confer and advise with the directors and furnish them such information as they request."

1033 (1978)[22] are supported by many affidavits and answered by the respondents by a motion under 12(b), with no supporting affidavits or counteraffidavits. *See* F.R.C.P. Rule 56(e).

The petitioners' case concisely stated is that on October 28, 1977, the petitioner bank was a chartered cooperative bank under the authority of M.G.L. c. 170. The petitioner directors and officers were elected to serve under the authority of M.G.L. c. 170, §§6 and 8. The petitioner shareholders had the right to elect its officers and directors, who controlled the assets and possessions of the Roslindale Bank.

On October 28, 1977, the Banking Commissioner, the respondent Greenwald, knowing that the Roslindale Bank was safe and it was expedient for it to continue in business, certified the Roslindale Bank into a statutory administrative receivership, and Greenwald, and her successor, Mulligan, and Central Bank have taken a deliberate course of action by denying the petitioners an administrative hearing to frustrate the Roslindale Bank and its officers from proving that the Roslindale Bank was wrongfully forced into receivership and has been wrongfully kept in receivership for over three years.

The certification proceeding held by the respondent Greenwald, was held in "secret" with no notice of charges given to the petitioner bank, or any of its officers, either "prior" or "post" promptly as required by constitutional law; or "48 hours prior" as described in M.G.L. c. 30A, §11A½; or "within a reasonable time" as described in M.G.L. c. 30A, §11(1); or "10 days prior" as described in the regulations in effect on October 28, 1977, of the Commissioner of Banks. No record of the proceeding was made in conformity with M.G.L. c. 66, §§5A or 6, and no clerk was appointed in accordance with M.G.L. c. 66,

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22. *Pupecki v. James Madison Corp.*, 78 Mass. A.S. 2340, 382 N.E. 2d 1030 (1978) at p. 1033:

> "The complaint was verified and is therefore treated as an affidavit insofar as it contains specific facts that the signer knows to be true Khan v. Garanzini, 411 F. 2nd 210, 212-213 (6th cir. 1969) 2A Moores Federal Practice p. 1104 at 11-13 (2nd Ed 1975) 5 C.A. Wright and Miller, Fed. Prac. and Proc. sec. 1335 at 508 (1969)."

§6. *See Kearney v. Bd. of Reg. Pharmacy*, 4 Ma. Ap. Ct. 25, 340 N.E. 2d 215 (1976), note *Epray* decision.

On October 29, 1977, the agents of Central Bank, knowing that the Commissioner of Banks had avoided giving the petitioners the procedural administrative due process of M.G.L. c. 167, §5 (the removal statute), or M.G.L. c. 170, App. 2, §4, or M.G.L. c. 30A, or M.G.L. c. 66, and the regulations of the Division of Banks, seized the Roslindale Bank and ousted the petitioners without giving the petitioner bank or the petitioners any prior or post prompt administrative due process; and since October 28, 1977, the respondents Greenwald, Mulligan and Central Bank refuse to give the Roslindale Bank or any of its officers administrative due process regarding the certification or the continued possession of the Roslindale Bank or rights of administrative or judicial review. *See Athas v. United States*, 597 F. 2d 722 (Ct. Cl. 1979).

On October 28, 1977, the respondents stigmatized the petitioners by making statements to the public media that contained falsehoods, half-truths, exaggerations and hearsay in violation of the petitioners' liberty rights. These statements were made in violation of the petitioners' constitutional liberty rights and the petitioners' "statutory entitlements" of M.G.L. c. 167, §§2 and 5; M.G.L. c. 214, §1B[23] and 3B[24] regarding M.G.L. c. 66A.

The respondent Central Bank's act of *de facto* removing the petitioner individuals from office, coupled with the stigmatization has actually denied to the petitioner individuals, their careers in banking and their statutory entitlements, *i.e.*, loss of compensation and enjoyment of their elected offices. The respondents did not give the petitioner individuals the opportunity of a name-clearing hearing, either "prior" or "post promptly" and denied to the petitioners, their rights of review as set forth in statutory law, regulations and constitutional decisions. *See Athas v. United States, supra.*

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23. *See* footnote 13.

24. *See* footnote 14.

On October 28, 1977, the Roslindale Bank was safe and it was expedient for the Roslindale Bank to continue in business. The Roslindale Bank met or exceeded all statutory requirements of a safe bank. The Roslindale Bank had been recommended for approval by the Federal Home Loan Bank on September 27, 1977 (one month prior). No extraordinary situation existed at the Roslindale Bank on October 28, 1977. On October 28, 1977, the "purported" information the respondent Greenwald acted upon was gathered and compiled in violation of M.G.L. c. 167, §2, in that a certified appraiser was not appointed to value the petitioners' mortgage portfolio and no notice was given to the petitioners and the Division of Banks had no regulations relative to gathering personal data as required by M.G.L. c. 66A.

The petitioner individual directors had a statutory entitlement to due process regarding mismanagement claims "prior" to their removal as officers as set forth in M.G.L. c. 167, §5, and the respondent Greenwald, purposely knowing that the financial conditions did not exist for authority to use M.G.L. c. 170, App. 2, §4, to certify the Roslindale Bank, knowingly and maliciously for political reasons, certified that it was unsafe and expedient for it to continue in business, in an attempt to remove the petitioner directors permanently by way of a forced "administrative merger" to deprive the petitioners of their procedural due process rights set forth in M.G.L. c. 167, §5.

The Commissioner of Banks and Central Bank are subject to M.G.L. c. 30A (The Administrative Procedures Act); M.G.L. c. 66 (The Public Records Laws), and M.G.L. c. 66A (The Fair Information Act), and they have massively violated same.

On October 28, 1977, the respondents, the Commissioner of Banks and Central Bank, had promulgated no rules and regulations as described in M.G.L. c. 170, App. 2, §§4 and 8 and the Commissioner of Banks and the Board created under M.G.L. c. 167, §5, had promulgated no rules and regulations as required by M.G.L. c. 30A, §9 (as it appeared in 1977).

The respondents have used statutes arbitrarily, capriciously and maliciously and they have failed to enact regulations, even after demand by proper procedures that would give the statutes

requisite standards of definition and/or give the petitioners procedural and substantive rights.

The respondents have made unlawful rules and regulations not in accordance with M.G.L. c. 30A, §§2 to 6B that exceeded their legislated authority and that are void by statutory mandate. *See* M.G.L. c. 30A, §3A.

On or about November 1, 1978, after a judicial conference, in which the original district court justice had declared the respondents had violated the petitioners' rights and in which he said he would appoint a master to assess damages against the respondents, the respondent Greenwald had four of the petitioners brought up on charges. The complaint consisted of every minor violation that had occurred in banking division reports for five years, committed by daily management. The evidence consisted mainly of two reports and two witnesses, who testified about the reports. Both witnesses testified the reports contained "hearsay upon hearsay" evidence. The agency stipulated that the four directors had no actual knowledge of the violations they were charged with being responsible for and they received no actual prior notice from the state as set forth in M.G.L. c. 167, §5.

The prosecutor admitted in the record that he withheld evidence. Both the prosecutor and the Commissioner, the "judge", had been in criminal violation of statutes. The "judge", the Commissioner of Banks, Greenwald, had determined on three prior occasions *ex parte* that the petitioners were guilty as charged and had made public statements defending her actions by condemning the petitioners. The "judge" had been meeting *ex parte* and corresponding *ex parte* for over one year with Central Bank. The "judge" actually had conferences with the state's witnesses during the trial. This fact was admitted by answer. Evidence material to the petitioners was denied, monitored and altered. Many other violations of due process were pleaded.

The petitioners also have pleaded that the respondents conspired together to justify the original deprivations (1985), and that all the respondents had it in their power to terminate or to aid the termination of the constitutional violations (1986).

On October 31, 1977, the petitioner president Albert G. Tobin had requested charges from the respondents Greenwald and Central Bank, and in front of witnesses requested rights of review. He was told that he and the bank had "no rights". *See Athas v. United States, supra.*

Course of Proceedings

On Friday, October 28, 1977, in a secret proceeding, the respondent Greenwald, "purportedly" certified the Roslindale Bank. On Saturday, after the close of business, also without notice, the Central Bank seized the Roslindale Bank and ousted its directors.

On Monday, October 31, 1977, the petitioners, in writing, gave a request to the Commissioner and Central Bank for a bill of particulars and a meeting, signed by all the directors, who met on Sunday, October 30, 1977, with a copy of a vote authorizing Tobin to bring a M.G.L. c. 167, §33 action.

On Monday, October 31, 1977, Tobin met with Deputy Commissioner Flynn who told Tobin that the Roslindale Bank and its directors had "no rights", and the Commissioner wanted the Roslindale Bank merged. Central Bank's executive officer and its lawyer also had told Tobin, that he and the Roslindale Bank had no rights, previous to Tobin's meeting with Deputy Flynn.

On November 8, 1977, the Roslindale Bank in its own name and joined by Tobin as president, brought a petition to the Supreme Judicial Court naming the Commissioner and Central Bank as respondents.

This case was commenced in the Supreme Judicial Court because the respondents denied that any of the petitioners had rights of review under M.G.L. c. 30A, §14, and refused to give the petitioners what their rights of review were, denying that the petitioners had rights. *See Athas v. United States, supra.*

The petitioners complained to the Supreme Judicial Court on November 8, 1977, because of M.G.L. c. 167, §33, in the

belief that possibly M.G.L. c. 170, App. 2, §10 was unconstitutional if the respondents' assertions were correct. Words in *Worcester County Bank v. Com. of Banks*, 340 Mass. 695, 166 N.E. 2d indicate that the Superior Court has no jurisdiction. The first count stated (1) there was no provision for review, and (2) M.G.L. c. 30A, §14 was inapplicable to the fact situation. Within thirty days, the petitioners, after they had researched the law further added a count under M.G.L. c. 30A, §14. One of the prayers was for the respondent Greenwald to show cause.

The Supreme Judicial Court declined jurisdiction and remanded the matter to the Superior Court. Since that time, the Supreme Judicial Court has remanded related matters twice to the Superior Court.

The Superior Court dismissed the petitioner bank's case without prejudice and the petitioner Tobin's case under motions for Rule 12(b)(6) and the petitioners appealed.

On January 11, 1978, after the Superior Court denied the *Tobin* case, the petitioners brought this action in the United States District Court of Massachusetts. The case was assigned to Judge Freedman. The jurisdictional basis was 28 U.S.C. §§1331, 1341, *i.e.*, 42 U.S.C. §§1983, 1985, 1986; 28 U.S.C. §2201.

The respondents' answers to the petitioners' complaint were motions under F.R.C.P. Rule 12(b)(6). However, the respondents did not file then, or ever, any supportative affidavits relative to the merits. On April 3, 1978, Judge Freedman heard the motions and he took the matter under advisement. In an effort to get Judge Freedman to act and because of the First Circuit rule on pleading malice (*i.e., Gomez v. Toledo*, 602 F. 2d 1018, 1020 (1st Cir. 1979), overruled by ____ U.S. ____, 64 L. Ed. 2d 572, 100 S. Ct. (1980). The petitioners filed many affidavits to make sure their pleadings exceeded this erroneous rule.

On August 9, 1978, at the request of the petitioners, Judge Freedman held a conference wherein he stated that although he had not finalized his opinion, he believed the petitioners' rights had been violated. He would appoint a master to assess damages

against the respondents and he ordered the respondents to report to his clerk by August 23, 1978, as to the status and/or position Greenwald would take as to the return of the bank.

The respondent Greenwald answered the court that she was going to call a M.G.L. c. 167, §2A presentation (not a due process confrontation hearing). Instead of returning the bank, the respondent Greenwald used this meeting to threaten five directors with charges under c. 167, §5, and did not file a complaint with the Superior Court as the statute directs.

The petitioners sought the protection of the district court from a M.G.L. c. 167, §5 hearing on five grounds: (1) the proposed hearing one year later was not "post prompt"; (2) both the Commissioner and the Board created under M.G.L. c. 167, §5 had no regulations as mandated by the Legislature; (3) the respondents were suppressing evidence which the petitioners needed for defense; (4) the obvious bias of the Commissioner and (5) the petitioners requested additional time for discovery purposes. The district court appointed a magistrate who granted a one week postponement and refused the other requests, and on appeal the First Circuit also refused the petitioners' request.

Simultaneously the petitioner bank and the (four) directors brought a M.G.L. c. 231A action on the same basis, and also were denied temporary orders by the Superior Court and the Appeals Court of Massachusetts.

One year after certification, without a hearing regarding the certification, the respondent Greenwald as "judge" on her last day as Commissioner, "purportedly" (there was no lawfully made record, and no lawfully appointed clerk, *see* M.G.L. c. 66, §§5A and 6) found the four petitioners guilty as charged and the Board upheld the finding, who also had appointed no clerk.

On February 28, 1979, the Supreme Judicial Court filed its decision. The decision stated the petitioner directors could challenge the certification, but upheld the Superior Court for reasons which the petitioners claim are affirmative defenses that were not pleaded in accordance with M.R.C.P. Rule 56(e) by the respondents, *i.e.*, lack of authority of *Tobin*, and failure to exhaust administrative remedies. This argument taken from the

respondents' "brief" and not affidavits *sua sponte* denied the petitioners the opportunity to deny the defense by affidavit, under M.R.C.P. Rule 56(e) which is similar to F.R.C.P. Rule 56(e).

In April of 1979, the petitioners amended their complaint to add current complaints relative to further violations of due process. The respondents again answered with a 12(b)(6).

The petitioners filed more affidavits in an effort to get the court to respond, but to no avail.

In early June, the case was reassigned to Judge Zobel, who called for a new hearing for July 2, 1979 on respondents' motion for Rule 12(b)(6).

The respondent Mulligan as a result of new court activity called another M.G.L. c. 167, §2A presentation for the seven directors "not tried" and the petitioners filed the second amended complaint.

At this M.G.L. c. 167, §2A presentation, the seven petitioners were denied the right to have an attorney present (one other than the Tobin's, as well as the Tobin's). The petitioners filed a twelfth count. A §2A presentation is not a due process hearing. The respondent Mulligan also did not file a complaint with the Superior Court as the statute directs.

On July 2, 1979, the respondents' attorneys stated to the district court (without pleadings), that the respondents were going to give the bank back to the seven petitioners not "removed". At this hearing the court also allowed the petitioners amendments to their complaint about the respondents' current arbitrary activities.

By October 5, 1979, the directors of the petitioner bank decided the respondents were not acting in good faith and sent a letter to the court requesting some order. When the court gave no indication of acting on November 29, 1977, the petitioners sent a letter to Chief Justice McCaffrey complaining about "no program for prompt disposition of protracted and widely publicized cases" in the district court and indicating their

intention to appeal along with (1) motion to transfer; (2) motion to request relief from regular assignments and (3) motion for certification under 28 U.S.C. §1292(b).

On December 7, 1979, the court rendered its first decision *Roslindale I*, dismissing the petitioner bank and all of the directors, except the four petitioners.

In January 1980, after *Roslindale I*, the petitioners again requested from the respondents Mulligan and Central Bank an administrative hearing relative to the "certification" and the continued possession of the petitioner bank as set forth in *Tobin*, p. 1248 fn. 3 "before the Commissioner" and the request was denied, the petitioners again requested "rights of review" and this request was denied.

The petitioners appealed the case of *Roslindale I*, and asked both the district court and the First Circuit Court for preliminary and protective orders (1) motion to order the respondents to comply with Massachusetts public meeting and record laws; (2) motion for an advance for attorneys' fees; (3) motion for an advance for costs of court and (4) motion for a protective order for the petitioners A. Tobin, R. Tobin, L. DeLosh and J. Quinn.

On March 25, 1980, the district court decided *Roslindale II* and on April 23, 1980 the appellate court denied the appeal of *Roslindale I*, 80-1069 and the petitioners' motions. The petitioners then appealed *Roslindale I* and *II* together.

On April 25, 1980, the petitioners brought a motion to amend the judgment under F.R.C.P. Rule 59(e) requesting the court to (1) retain jurisdiction but staying the proceeding and (2) order a dismissal without prejudice, as set forth in *Am. Trial Lawyers Ass'n v. N.J. Supreme Court*, 409 U.S. 497, 34 L. Ed. 2d 651 at 659 (1973). On April 29, 1980 the district court denied the motion. The petitioners again appealed and consolidated both appeals.

On June 6, 1980 after the decision of the district court of *Roslindale I* and *Roslindale II*, the petitioners brought a motion

to amend the *Tobin* case to add a count under 231A, which was denied by the Superior Court of Massachusetts.

The appellate court rendered its decision of *Roslindale III* on November 21, 1980 stating *sua sponte* that the petitioners should have pursued a cause of action under M.G.L. c. 167, § 33. This defense had not been pleaded by the respondents. The petitioners had no opportunity to counter plead.

The petitioners requested a rehearing on the basis of *McNeese v. Board of Education* and the fact that M.G.L. c. 170, App. 2, §10 explicitly denied to Roslindale Bank as a member of Central Bank the use of M.G.L. c. 167, §33. The appellate court then amended its decision and stated the same conclusion as the district court that M.G.L. c. 231A afforded the petitioners relief.

The petitioners then requested the second rehearing on the basis that M.G.L. c. 231A was a (1) state judicial remedy; (2) it gave the court secondary jurisdiction only and it was a limited review and not a hearing on the facts and (3) it was questionable that it could be used because M.G.L. c. 231A, §3 required an affidavit of known procedure.

The appellate court denied the petition for a second rehearing.

The petitioners then brought a petition for recall of the mandate, to allow the petitioners to bring a motion for protective order to order the respondents to give the petitioner bank an advance of its own funds to appeal to the United States Supreme Court. The appellate court denied the motion. The motion is in the Appendix, *infra* at p. 2a.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

The first and foremost reason to require plenary consideration of this Court is that it is perfectly permissible in the First Circuit for an activist Bank Commissioner to order a sound bank taken over and seized without any form of due process for over three years in regard to the original seizure or to the reason why the bank is still in the state of seizure when it

was never intended that it be liquidated nor were there any debts and the bank's reserves exceeded all statutory mandates. No director was involved in any criminal or fraudulent scheme.

The petitioners state that a determination of the constitutionality of these banking statutes are important because all cooperative and savings banks in Massachusetts and their officers are subject to these same laws. The petitioners say the statutes contain "overbreadth" and permit too much arbitrary discretion which subject the bankers to political whims of one Banking Commissioner. *See Manges v. Camp*, 474 F. 2d 97 at 101 (1973) and *Feinberg v. F.D.I*, 420 F. Supp. 109 (1976). *See also, Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952) cited in Supreme Court Rule 18. The Roslindale Bank, sound and healthy, remains "seized" by the government after three years without due process.

I.

The district court must exercise its jurisdiction.

The petitioners say that they have a constitutional right to choose the federal forum for redress of their complaints against the respondents for depriving them of their federal constitutional rights "under color" of state law. *England v. Louisa Bd. of Medical Examiners*, 375 U.S. 111 (1964) states at 415:

> "When a federal court is properly appealed to in a case over which it has jurisdiction .... The right of a party to choose a federal court where there is a choice, cannot be properly denied."

The petitioners have pleaded that the United States District Court has jurisdiction of this case under three separate and distinct codes:

1. 28 U.S.C. §1331. The petitioners have pleaded their case arises under the rights of the United States Constitution and that their damages are in excess of $10,000.

2. 28 U.S.C. §1341. The petitioners have pleaded that their

constitutional rights have been violated under color of state law (1982); that there has been a conspiracy by two or more persons (1985) and that all of the respondents named had the power to prevent or aid in the prevention of their constitutional rights (1986).

3. 28 U.S.C. §2201, Declaratory Judgment. The Supreme Judicial Court in *Tobin, supra,* states at p. 1248 fn. 3, that the petitioners may challenge the "certification" before the Commissioner or in some circumstances under M.G.L. c. 231A (the Massachusetts declaratory judgment). The district court and the First Circuit decline jurisdiction on the basis that a M.G.L. c 231A action will lie.

The petitioners say that this case is an actual controversy and the petitioners are seeking to have their federal rights declared, and if a M.G.L. c. 231A action for a declaratory judgment will lie then a 28 U.S.C. §2201 action for declaratory judgment must also lie because the purposes of both are exactly the same, to declare constitutional rights.

The petitioners say the law of *Monroe v. Pape,* 365 U.S. 167 (1961) as elaborated by *McNeese v. Board of Education,* 373 U.S. 668 (1963) and recently again reiterated in *Allen v. McCurry,* 101 S. Ct. 2d 411 at 418, Sl. Op. 79-935 (Dec. 9, 1980). *See also, England v. La. Bd. of Medical Examiners,* 375 U.S. 111 at 115 (1964). The petitioners say the district court's application of withholding jurisdiction on a fiction that the state respondents may return the bank, has in this case been worse than if the court had immediately abstained, because the petitioners were forced to wait over two years for the decision. Furthermore, the petitioners say the Exhaustion Doctrine is an affirmative defense and cannot apply to this case as the respondents have not pleaded it. *See Central Motors v. City of Pepper Pike,* 63 Ohio App. Ct. 2d 34, 409 N.E. 2d 258 (1980); *cf., Gomez v. Toledo,* 64 L. Ed. 673, 100 S. Ct. 2d ____, Sl. Op. 79-5601 (1980). Even if it did apply, the petitioners have pleaded there were and are no procedures available regarding M.G.L. c. 170, App. 2, §§4 and 5 for the petitioners to use. *See Swan v. Stoneman,* 635 F. 2d 97 (2d Cir. 1980).[25] *Susquehanna Valley v.*

25. *See* footnote 2.

Three Mile Island, 619 F. 2d 231 at 245 (1980); *Feinberg v. F.D.I.C.,* 420 F. Supp. 109 (1976) and *Manges v. Camp,* 474 F. 2d 97 (5th Cir. 1973).

The petitioners say that no administrative hearing and/or no judicial hearing held at this late date can timely correct these constitutionally required deficiencies of procedure, and it does not matter what the state law is. However, the petitioners also claim that the respondents violated the state procedures which is a separate and distinct constitutional violation of the Fourteenth Amendment's equal application of the law clause. *See Service v. Dulles,* 354 U.S. 363 (1957); *Whiteside v. Kay,* 446 F. Supp. 716 (1978) and *Goss v. Lopez,* 419 U.S. 565 (1975). *See Kearney v. Bd. of Reg. Pharmacy, supra;* note *Epray* decision.

The denial of federal jurisdiction to the petitioners for a complaint based upon violations of federally guaranteed rights by the respondents is declared by the following court statements: *Roslindale I,* 481 F. Supp. 749 at 754 (D.C. Mass. 1979);[26] *Roslindale II,* ___F. Supp. ___ (D.C. Mass. 1980)[27];

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26. *Roslindale I,* 481 F. Supp. 749 (D.C. Mass. 1979) at 754:

> "The availability of equitable relief under Mass. Gen'l laws ch. 231A, see Tobin v. Com. of Banks, 386 N.E.2d 1248, meets all requirements of due process in the context of bank certification."

27. *Roslindale II,* ___ F. Supp. ___ (D.C. Mass. 1980) at 4:

> "As a matter of constitutional law, the only question before me is whether the plaintiffs were afforded a fair opportunity to answer charges against them."

At 5:

> "Challenges to the sufficiency of the evidence upon which Greenwald rendered her decision or to the soundness of her evidentiary rulings are not within the subject matter jurisdiction of this court, but may be, and are being, pursued by the plaintiffs in accordance with their statutory right of appeal within the state court system. See Mass. Gen. Laws 167, sec. 5. . . ."

Roslindale III, ___ F. 2d ___ (1st Cir. 1980).[28]

The petitioners say that these decisions are in conflict with the Supreme Court decisions of *Monroe v. Pape,* 365 U.S. 167 (1961); *McNeese v. Bd. of Education,* 373 U.S. 668 (1963)[29] and *Swan v. Stoneman,* 635 F. 2d 97 (2nd Cir. 1980).[30]

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28. *Roslindale, III,* ___ F. 2d ___ (1st Cir. 1980) at 4:

> "As for a post event hearing Mass. G.L. c. 167 sec. 33 provides for review in the Supreme Judicial Court whenever any bank whose property and business feels itself aggrieved thereby and files within ten days. In point of fact, while this section originally covered Co-operative Banks, see Lowell Co-operative Bank, 287 Mass. 338, 344-46, 191 N.E. 921, 924-25, it no longer does, Mass. G.L. 170 App. 2, sec. 10. However, the broad provisions of the Massachusetts Declaratory Judgment Act, Mass. G.L. c. 231 A, afforded the plaintiffs an avenue for relief. See Tobin v. Com. of Banks, ante 1979 Mass. A.S. at 499 n. 3, 386 N.E. 2d at 1248, n.3; Canney v. Mun. Court, 1975, 368 Mass. 648, 335 N.E. 2d 651; Franklin Fair Ass'n v. Sec. of the Comw., 1964, 347 Mass. 110, 196 N.E. 2d 622. . . ."

29. *McNeese v. Board of Education,* 373 U.S. 668 (1963) at 671-72:

> "That is the statute that was involved in Monroe v. Pape, supra and we reviewed its history at length in that case. 365 U.S. 171 et seq., 81 S. Ct. at 475, et seq. The purposes were several-fold to overide certain kinds of state law, to provide a remedy where the state remedy was inadequate, to provide a federal remedy where the state remedy, though adequate in theory was not available in practice, and to provide a remedy in the federal courts supplementary to any remedy any state may have. . . ."

30. *Swan v. Stoneman,* 635 F. 2d 97 (1980) at 102:

> "It is well settled that exhaustion of state judicial remedies is not a prerequisite to an adjudication of 1983 claims in federal court. Ellis v. Dyson, 421 U.S. 426 (1975), Welwording v. Swenson, 404 U.S. 249, 251 (1971), McNeese v. Board of Education, 373 U.S. 668 (1963); Monroe v. Pape, 365 U.S. 167, 183 (1961)."

II.

The Supreme Judicial Court, the district court, and the appellate court, have granted the respondents defenses that the respondents did not plead, contrary to F.R.Civ. Proc. Rules 8(c) and 56(e).

The petitioners say that the acceptance by the courts in this case, of the respondents' arguments by either brief or motion not supported by counter affidavits is wrong. The acceptance of legal propositions that have as their basis facts not pleaded in effect denies the the petitioners the opportunity to counter plead by affidavit that is their right under F.R.C.P. Rule 56(e).

The petitioners filed a verified complaint on January 5, 1978. The state respondent filed a motion to dismiss on January 31, 1978 on the basis of two grounds (1) the complaint failed to state a claim and (2) the petitioner bank and Albert Tobin had commenced suit in the state court. The state respondents did not file any supportative affidavits prior to the decision of *Roslindale I* on December 7, 1979.

The Central Bank respondent filed a motion to dismiss based upon (1) insufficiency of service which the petitioners immediately corrected and (2) failure to state a claim. The Central Bank did not file any supportative affidavits to challenge the merits of the case prior to *Roslindale I.*

The respondents did not counter plead but continued to argue only by briefs which were unsupported by affidavits.

Although the petitioners were not required to file supportative affidavits the petitioners did file them concerning ongoing additional violations of the respondents and also because of the district court's inactivity as well as the First Circuit's erroneous rule regarding pleading of malice of the respondents, which was overruled by *Gomez v. Toledo,* ___ U.S. ___, *supra.*

The petitioners say that because their complaint was verified it is similar to an affidavit which the respondents must

answer or it must be taken true as pleaded by the court. *Pupecki v. James Madison Corp.*, Mass. Adv. Sh. 2340, 2345-6, 382 N.E. 2d 1030 at 1033 (1978).[31]

F.R.C.P. Rule 8(c) requires the respondents to plead "any matter constituting an avoidance or affirmative defense." *see Gomez v. Toledo*, Sl. Dec. 79-5601 at p. 6.[32]

F.R.C.P. Rule 56(e)[33] requires the respondents, after a motion for summary judgment has been made, to set forth specific facts.

The court must view, because of the lack of the respondents' affidavits, all of the petitioners' pleadings in the light most favorable to the petitioners. *Ferguson v. Ominedia*, 469 F. 2d 194 at 198 (1st Cir. 1973) and all of the petitioners' allegations must be treated as facts. *Latrobe Electric Steel Co. v. Vascomy Ramet Corp.*, 55 F. Supp. 347 at 348, fn. 1 (D. Del. 1944).

The petitioners say they have plainly and clearly pleaded that the respondents have made no record of any proceeding as required by state law and many other violations of due process.

The petitioners say that the respondents can never plead an affirmative defense that can justify their actions. Any affirmative defense must have as a basis of origin in this case of either a meeting in which there was a clerk appointed and a record made that can be certified in accordance with Rule 44,[34] or rules and

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31. *See* footnote 22.

32. *Gomez v. Toledo*, ___U.S.___, 64 L. Ed. 2d 572, 100 S. Ct. ___, Sl. Dec. 79-5601 (May 27, 1980) at 6:

> "Since qualified immunity is a defense, the burden of pleading it rests with the defendant. See Fed. Rule Civ. Proc. 8(c) (defendant must plead any 'matter constituting an avoidance or affirmative defense'); 5 C. Wright & A Miller, Federal Practice and Procedure, sec. 1271 (1969)."

33. *See* appendix, *infra* at p. 43a.

34. *See* appendix, *infra* at p. 42a.

regulations made under the authority of either M.G.L. c. 170, App. 2, §§4 or 8. The petitioners say that no evidence of what took place at the "purported" certification meeting can ever be introduced in a trial because it would be in violation of not only Rule 44, but also the parol evidence rule. *See N.E. Box Co. v. C.R. Construction Co.*,[35] 313 Mass. 698, 49 N.E. 2d 121 (1943) and *Suburban Land Co. v. Billerica*, 314 Mass. 184, 49 N.E. 2d 1012 (1943).[36] The parol evidence rule is a matter of substantive law. *Kessler Shoe Co. v. Philadelphia Fire & Marine*, 295 Mass. 123, 3 N.E. 2d 257; *see also, Kearney v. Bd. of Reg. Pharmacy, supra*, note *Epray* decision; *cf., Citizens to Preserve Overton Park v. Volpe*, 491 U.S. 402 (1971) and *National Pork Prod. Council v. Bergland*, 484 F. Supp. 540 at 544 (1980). The petitioners say the respondents can never raise this affirmative defense nor can the court accept evidence other than from a record, which was never made. *See N.E. Box. Co. v. C. & R. Const., supra.*

The respondents enacted rules and regulations but did not file them with the state secretary as required by M.G.L. c. 30A, §§2 to 6B and therefore the court can never take judicial notice of them. This unlawful conduct of the respondents makes all subsequent actions (after November 4 and 8, 1977) void by the respondent Greenwald and Central Bank. *See* M.G.L. c. 30A, §2, *Saxon Coffee Shop v. Boston Lic. Bd.*, ___ Mass. ___, 407 N.E. 2d 311 (1980);[37] *Purity Supreme v Attorney General*, ___ Mass. ___, 407 N.E. 2d 297 (1980).

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35. *See* footnote 11.

36. *See* footnote 12.

37. *Saxon Coffee Shop v. Boston Lic. Bd.*, ___ Mass. ___, 407 N.E. 2d 311 (1980) at 316:

> "The regulations of the Board are not published and thus we are not permitted to take notice of them. see GL. c. 30A, sec. 6; *Purity Supreme v. Attorney General*, ___ Mass. ___, 407 N.E. 2d 316 (1980)."

III.

The petitioners have pleaded specific facts which must be taken by the court as true, and therefore it is the petitioners who are entitled to summary judgment.

The petitioners have clearly pleaded that they have a "property right" and a "liberty right" and the district court in *Roslindale I* agrees. The petitioners have pled that their property interest and liberty interest have been denied for over three years and the district court disagrees[38] even though the respondents are in control of the petitioner bank's assets and the petitioner individuals have not received compensation or controlled the assets for three years.

In the respondents' best light, the petitioners say that they have at least temporarily diminished the petitioners' constitutional rights without due process. It is no answer, that the respondents may at some speculative time in the future restore those rights. It is well settled that a temporary deprivation is a protected right of the Fourteenth Amendment. *Fuentes v. Shevin*, 407 U.S. 67 (1972).[39]

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38. *Roslindale I*, 481 F. Supp. at 754:

> "A further reason compels dismissal of the plaintiff directors' claims arising out of certification of the bank. As both the complaint and the certification statute indicate Greenwald's action with respect to the bank did not terminate the plaintiffs directorships. It is still possible that the bank's business will be restored to full managerial powers, indeed it appears from the complaint, steps toward this end have been taken. In the absence of a conclusive termination of status, plaintiff directors cannot argue that they have been denied their constitutional rights. *Board of Regents v. Roth*, supra; *Paul v. Davis*, 424 U.S. 701."

39. *Fuentes v. Shevin*, 407 U.S. at 84-85:

> ". . . But it is now well settled that a temporary non-final deprivation of property is nevertheless a 'deprivation' in the terms of the Fourteenth Amendment. *Snaidach v. Family Finance Corp.*, 395 U.S. 337; *Bell v. Burson*, 402 U.S. 535. Both *Snaidach* and *Bell* involved takings of property pending final judgment in an underlying dispute."

The petitioners further say that the Roslindale Bank and its directors were entitled to prior notice, by statute and by regulations and that the district court had no right to superimpose its wisdom on the Legislature or over the regulations of the Commissioner of Banks. *See Minn. v. Cloverleaf,* ___ U.S. ___, 101 S. Ct. 2d 715 at 726, 66 L. Ed. 2d (1980).[40]

The district court has also ignored the pleadings relative to "stigmatization." *Owens v. City of Ind. Mo.,* ___ U.S. ___, 100 S. Ct. 1399 (1940).

The petitioners submitted an affidavit that contained 56 pages of derogatory newspaper articles which commenced with the seizure. The local weekly newspaper's first edition in a headline article after the seizure, quoted the respondent Greenwald as saying: "No one in the bank could be trusted." Almost all the articles contained a charge of mismanagement. The district court dispels this stigmatization pleaded in *Roslindale I,* 481 F. Supp. at 754, fn. 3, by merely stating that "the statute is neutral" and ignores the affidavits of the petitioners containing derogatory newspaper articles that defame the petitioner bank and the petitioner individuals.

The petitioners have pleaded that the respondents have massively violated M.G.L. c. 30A, 66 and 66A. They have also pleaded that at least three of the petitioners are registered voters as described in M.G.L. c. 30A, §11A½ and M.G.L. c. 66, §17C and §10. These pleadings give rise to "statutory judicial entitlements" which the district court has chosen to ignore, and the respondents by failing to plead counter affidavits have chosen not to sustain. These statutes place the burden of proof on the respondents to show by a preponderance of the evidence that the actions complained of in such a complaint are in accordance with and authorized by the statutes involved or the court must find summary judgment for the petitioners.

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40. *Minn. v. Cloverleaf,* ___ U.S. ___, 101 S. Ct. 715 (1981):

> "The Court has no authority to superimpose its wisdom over procedures set forth by the Legislature."

It is to be noted that in *Roslindale I*, 491 F. Supp. at 555, the district court cites by name, *Gomez v. Toledo*, 602 F. 2d 1018 (1st Cir. 1979). This citation by itself conclusively proves that clear error exists in regard to the pleadings in both *Roslindale I*, 491 F. Supp. and *Roslindale III*, ___ F.2d ___. Therefore, both decisions are necessarily contrary to *Gomez v. Toledo*, ___ U.S. ___, *supra*.

The petitioners have pleaded many violations of due process other than denial of their "property" and "liberty" rights, they have far exceeded the minimum requirements of *Gomez v. Toledo*, ___ U.S. ___, *supra*. They have pled violations of basic constitutional rights that go to the very heart of due process and for which there could never be an affirmative defense pleaded to justify the respondents' actions (1) deliberate misuse of authority of statutes; (2) suppression and alterations of "public records"; (3) "missing" public records; (4) refusal to appoint clerks for the obtaining of public records by subpoena; (5) one year of *ex parte* conduct prior to trial by the "judge"; (6) *ex parte* conferences between the "judge", the prosecutor and the state witnesses during the trial; (7) public pronouncements by the "judge" prior to trial; (8) almost complete hearsay evidence; (9) bias of the judge, which the district court finds "irrelevant"[41]; (10) refusal of the right of cross examination; (11) refusal of the right to have an attorney present at an administrative hearing.

The petitioners say they have pleaded violations of minimum requirements of the Federal Constitution regardless what the state law is. If the state law approves this type of

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41. *Roslindale II Decision*, March 25, 1980, last page:

> "Nor do I find as relevant the allegations of Greenwald's bias and malice. Whatever sentiments Greenwald may have brought with her to the proceeding, the end result was a fair, constitutionally adequate administrative proceeding. Challenges to the sufficiency of evidence upon which Greenwald rendered her decision, or to the soundness of her evidentiary rulings are not within the subject matter jurisdiction of this Court, but may be, and are being, pursued by plaintiffs in accordance with their statutory right of appeal within the state Court system. See Mass. G.L. 167, sec. 5."

conduct that law is unconstitutional. For violations of minimum federal procedural requirements they are entitled to per se damages, *Carey v. Phipus,* 435 U.S. 247 (1978) and compensatory damages, *Wood v. Strickland,* 420 U.S. 308 (1974).

The petitioners also say they have pleaded sufficient facts to prove subjective malice. There could be no possible affirmative defense for the many violations committed and for the keeping of the assets of a sound bank for over three years on the basis of a liquidation statute, when only four directors out of twelve were charged and the remaining majority of the board were willing to serve. It is to be noted no "day to day" management has been charged for any offenses, and the President of Central Bank has testified he has seen no evidence of any criminal conduct or fraudulent activity of any director who was "charged."

IV.

The district court has aided the respondents to continue the violations of the petitioners' rights by failing to grant timely orders to enable the petitioners to obtain judicial due process either in state or federal courts.

The petitioners say that the failing to act on a declaratory judgment for two years by itself is an abuse of discretion. Declaratory judgments are supposed to be acted upon speedily. *See* F.R.C.P. Rule 57; *United States v. Lynd,* 301 F. 2d 818 (5th Cir.), *cert. denied,* 371 U.S. 893 (1962).

The petitioners had pleaded that the respondents were violating M.G.L. c. 66 in full view of the district court, and they called to the court's attention that violations of M.G.L. c. 66 were criminal violations. *See* M.G.L. c. 66, §§15 and 17.

The petitioners further say that they requested an enlargement of time for filing affidavits until the respondents allow the petitioners to obtain copies of their records which the court refused to act upon.

The petitioners also requested funds to hire counsel and for costs of court for the petitioner bank, to challenge the "certification" which the court refused to act upon. *See Anderson v. Great Republic Life Ins. Co.*, ___ Cal. ___, 106 P. 2d at 82 (1940); *Watson v. Johnson*, ___ Wash. ___, 24 P. 2d 592, 89 A.L.R. 1527 (1933).

The petitioners say they have a First Amendment right to obtain "public records" for the purposes of obtaining judicial due process. *Richmond Newspapers v. Virginia*, Sl. Op. 79-243 (1980); *see* opinion of Brennan J., pp. 3-4 (the right to gather information) and Stevens J.

V.

M.G.L. c. 170, App. 2, §§4 and 5 and M.G.L. c. 167, §5 are unconstitutional on their face, or at least unconstitutional without rules and regulations, and/or as used by the respondents against the petitioners.

The petitioners say that M.G.L. c. 170, App. 2, §§4 and 5 are either unconstitutional on their face or their use by the respondents in the manner used is unconstitutional, as the respondents' conduct toward the petitioners has been arbitrary and capricious.

The petitioners say that M.G.L. c. 167, §5 is as serious, as opposed to petty civil as well as penal contemnor,[42] and their trial by the administrative instead of the judicial branch of government is a violation of the separation of powers of the Constitution. *United States v. Ward*, ___ U.S. ___, Sl. Dec. 79-349 (1980).

The petitioners further say that M.G.L. c. 167, §5 mixes the functions of adjudication-prosecution-and-investigation. *See*

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42. M.G.L. c. 167, §5 (in pertinent part):

> ". . .Any person removed . . . who thereafter participates . . . shall be punished by imprisonment . . . for not more than five years or by fine of not more than five thousand dollars or both . . . ."

Joint Anti-Facist Committee v. McGrath, 341 U.S. 123 (1951) and *Wong Yang Sun v. McGrath*, 339 U.S. 33 (1950).

One of the stipulations agreed to by the "prosecutor" Flynn was that there have been no rules and regulations filed in accordance with M.G.L. c. 30A, §2, by the Board created by M.G.L. c. 167, §5, or the Commissioner. The petitioners also pleaded that neither the Commissioner nor Central Bank have enacted lawful rules as set forth in M.G.L. c. 170, App. 2, §4 or §8, but enacted unlawful rules.

The petitioners say that the rules "adopted" by the Board were not published by them as pertaining to M.G.L. c. 167, §5, in accordance with M.G.L. c. 30A, §§2 to 6B, and were therefore void. *See* M.G.L. c. 30A, §3A. The Commissioner's "adopted" rules were also void as repealed by the Acts of 1977 c. 963. (*See* M.G.L. c. 30A, §9 as amended by Acts of 1977, c. 963), nor did they meet the higher standards of jurisprudence as required by the Acts of 1977 c. 963. The Board could have adopted the tenative pre-published rules of the Commission of Administration that met the higher standards required by the Legislature and set forth in the Acts of 1977 c. 963, instead of adopting the Commissioner of Banks Regulations without prior publication as described in M.G.L. c. 30A, §2, that did not meet the standards that were required by the Legislature.

The petitioners also say the failure of the agencies to make the regulations set forth in the statutes, makes the use of the statutes without the intended regulations to define or clarify the statutes is a violation of due process because the statutes are then overbroad and contain arbitrary discretion, or are vague as to the petitioners' procedural and substantive rights. *Feinberg v. F.D.I.C.*, 420 F. Supp. 109 at 114 (D.C. 1976); *Van Wilpen v. Van Wilpen*, 370 So. 2d 231 (Fla. App. Ct. 1979); *Yeik v. Dept. of Taxation*, 595 P. 2d 965 at 969 (1979).

VI.

The M.G.L. c. 167, §5 hearing was conducted by a "judge" who was biased as a matter of law, and the hearing procedures violated the petitioners' (four) constitutional rights of due process.

The petitioners have pleaded that in April 1978 the respondent Flynn publically stated in a hearing before the Legislative Committee on Banks and Banking that the reason the Commissioner had not charged any person under M.G.L. c. 167, §5 was "In the absence of 'real criminal activity' I don't think justice would be served by that approach."

The district court completely ignored the stipulation agreed to by the state at the M.G.L. c. 167, §5 hearing of the petitioners (four); (1) that the directors charged had no actual notice of the violations complained of (which were mostly attributed to daily management, and not to the directors who met monthly [the president is similar to the chairman of the board]); (2) that the Commissioner of Banks and the Division of Banks gave no notice to any of the individual directors, as described in M.G.L. c. 167, §5; (3) that the petitioners (four) charged, or any other director, had no opportunity to correct any violations themselves (or to order the day-to-day management to correct violations), as described in the procedures set forth in M.G.L. c. 167, §5.

It is the petitioners' contention that unless the pre-notice procedures set forth in M.G.L. c. 167, §5 are followed by the Commissioner of Banks, that this statute is unconstitutional because of overbreadth and vagueness, "regulatory standards are narrower when amendment freedoms are at stake", *N.A.A.C.P. v. Button*, 371 U.S. 415 at 432 (1963). The petitioners say that if M.G.L. c. 167, §5 is not a fair warning statute, as interpreted by Kaplan, J. in *Ottoway Newspapers v. Appeals Court*, ___ Mass. ___, 386 N.E. 2d 1189 at 1193 (1977), note fn. 6 and the "statute is not singular", fn. 6 contains the citation of six similar statutes where prior notice and an opportunity to correct are prerequisites, the statute lacks malice or scienter. *See Com. v. Bank of Mutual Redemption*, 4 Allen 1 (Mass. 1862). It is to be

noted that the statute in 1932 was captioned "An Act for the Removal and Punishment of Bank Officers Who Persist in Improper Practices." There are thousands of sections of banking statutes and regulations that reasonable men may differ upon the interpretation, and many enacted by Greenwald that represented political activist ideas not based on sound banking practices, as well as a usurping of authority.

The petitioners further state that the use of all banking statutes, M.G.L. §§2A, 5, and M.G.L. c. 170, App. 2, §4, is a latent example of the unequal treatment that the Roslindale bankers have received from the Commissioners of Banks. The reason there were no regulations is that the statutes have not been used before in the manner in which the respondents applied them to the petitioners. The court has allowed "unrestrained discretion". *Grayed v. Rockford,* 408 U.S. 108 at 109.

The Supreme Court has declared in *In re Murchinson,* 349 U.S. 133, that, "Every procedure which would offer a possible temptation to the average man as a judge not to hold the balance clear and true between the state and the accused denies the latter due process." Yet after the district court made his pronouncement that he believed the respondents were liable for damages, both the district court and the appellate court allowed the petitioners (four) to be the subject of a trial held by these same respondents who the court had declared were to be liable for damages.

It was not until Judge Freedman said in his conference that (1) he believed the respondents had violated the petitioners' constitutional rights; (2) that the respondents were liable for damages; (3) that he intended to appoint a master to assess damages. After this conference and over one year later than their actual *de facto* removal, the petitioners (four) were brought up on charges by the respondents.

The respondent Greenwald became the "impartial judge". The respondent Flynn became the "impartial prosecutor". The counsel for the respondent Central Bank "manufactured" an "impartial report", which was submitted in secret *ex parte* two months before the hearing to the "impartial judge" Greenwald.

The assistant legal counsel for Central Bank became the "impartial star witness" for the prosecution at the hearing. The report he testified about was written by Central Bank's legal counsel and secretly given to Greenwald on the very same day that the respondents were to report to Judge Freedman what they were going to do about giving Roslindale Bank back, two months earlier.

The district court and the appellate court completely ignored the petitioners' verified fourth count as well as the petitioners' uncontroverted affidavits. The district court's statement, on page 14a, *infra*, "Nor do I regard as relevant the allegations of Greenwald's bias and malice." shows the district court's strange concept of the requirements of a fair trial and an impartial judge.

The petitioners' verified fourth count and uncontroverted affidavits which must be believed as true, stated: (1) the respondent Greenwald continually for over one year engaged in *ex parte* proceedings. During the trial, she engaged in *ex parte* conferences not only with "her" lawyer, but also with the prosecutor, the respondent Flynn and the state witnesses. This fact was admitted in the respondent Greenwald's answer and also backed up by copies of the stenographic record of the proceedings. *See Camero v. United States*, 375 F. 2d 777 (1971); *Amos Treat Co. v. Sec. Exc. Com.*, 306 F. 2d 260 (1970); *Powell v. Ward*, 392 F. Supp. 628 (1975); (2) Neither the Commissioner of Banks, the Board created under M.G.L. c. 167, §5, or the Commissioner of Administration, had made rules and regulations concerning M.G.L. c. 167, §5 as required by M.G.L. c. 30A, §9 (either prior or after the amendment change of July 1, 1978). This fact was backed up by certificates from the Secretary of State's office. *See Yeik v. Dep't of Taxation*, ___ Wyo. ___, 595 P. 2d 965 at 969 (1979); *Van Wilpen v. Van Wilpen*, ___ Fla. App. Ct. ___, 370 So. 2d 231 (1979); *Feinberg v. F.D.I.C.*, 420 F. Supp. 109 at 114 (1976); (3) Prior to the hearing the respondent Greenwald as "judge" "investigator" and "prosecutor" had determined three times *ex parte* that the petitioners were guilty of mismanagement and had made many public statements to the media regarding the petitioners' "guilt." These statements are backed up by facts pleaded in the verified

complaint and an affidavit consisting of about 56 pages of various newspaper articles; (4) The respondents, including the "impartial judge" were all in criminal violation of M.G.L. c. 66, *see* M.G.L. c. 66, §§15 and 17, and that they had refused to appoint a clerk so that the petitioners could summons records or obtain records, or to prove the lack of records. The respondents also suppressed records, altered records, monitored records, and lied about the existence of records being available. This pleading was backed up by certificates from the State Secretary, copies of records blanked out, stenographic minutes wherein the respondent Flynn admits he has denied the petitioners records and testimony from the examiner that his report is "hearsay upon hearsay" and that it had been altered.

The district court refused the petitioners' motions to order the respondents to appoint a clerk, or to make the respondents comply with the Public Records Laws, M.G.L. c. 66; or the Fair Information Practices Act, M.G.L. c. 66A. The petitioners claim that since *Richmond Newspapers v. Virginia, supra* that these statutes merely set forth procedures which are as a matter of law a First Amendment right.

CONCLUSION

The petitioners say that this case is a perfect example of the injustices created daily when "activist political appointees" become administrative justices, and when citizens' constitutional rights have confrontations with the court-created doctrines of primary jurisdiction, primary resort, and exhaustion of administrative remedies. All of the doctrines should be abolished because they diminish the jurisdiction of the court and cloud sound judicial judgments when these type of cases reach the judicial stage for any reason. At least in serious contemnors, whether civil or penal in nature, the court should be unhampered when it sees injustice by administrators.

The standard of jurisprudence that our country is noted for in its court systems, *i.e.*, impartial judges, discovery rules, evidence rules should not be lowered merely because the defendant is some administrative body. Political activist appointees usually are blind experts to their particular field and

their particular viewpoints. Justice should not be lowered in matters that concern citizens' livelihoods. The above court-created doctrines have led to administrative costs and to the creation of an "administrative judiciary" that far exceeds the reasons for their creation. The cases that have led to the perversion of the doctrines of separation of powers should be reviewed. Those cases have led to a revolt of the citizenry against administrative regulation, which is a true function of the Legislature not the executive. Decisions on adjudicatory "serious" matters should remain unshackled in the judiciary, who have limited time to read thousands of pages of "dry" administrative hearing records.

The petitioners' uncontroverted affidavits that are backed up by supportative facts clearly prove that respondent Greenwald and her political allies were engaged in seeking federal block grants in the Roslindale Jamaica Plain area. The petitioners' facts prove without a doubt that Greenwald certified the Roslindale Bank for political reasons. The act of certification occurred within the hour that the president of the Roslindale Bank, after being threatened, obtained an injunction for a pro-life political community group led by a local parish priest. The injunction was obtained against pro-abortion supporters of Governor Dukakis' administration who included the Bank Commissioner's first administrative assistant. The respondent supporters had been in constant communication with the first administrative assistant, who was in communication with Greenwald.

The petitioners say that state bankers in this situation need the protection from state-elected officials that should be obtainable in the federal courts. The shroud of secrecy that surrounds the banking industry in administrative adjudicatory decisions should not be allowed to act as a protective shield to allow politically-appointed administrators to misuse their oath of office to unlawfully thrust their activist ideas upon the banking industry or upon bankers that disagree with the political philosphy of the appointed commissioner.

The petitioners say the respondents have violated the statutory scheme. However, if the court should determine that

the respondents have not violated the scheme, any statutory scheme that clothes one person, unchecked by others, with the power of the Legislature to enact or not to enact regulations, and the power of the executives to investigate and enforce them, is unconstitutional, if that scheme allows the same person to have the powers of the judiciary to interpret the laws he enacted and adjudicate the facts she investigated.

Respectfully submitted,

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APPENDIX A — ORDER DENYING MOTION

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 80-1280

ROSLINDALE CO-OPERATIVE BANK OF BOSTON, ET AL.,

Plaintiffs, Appellants,

v.

CAROL S. GREENWALD, ET AL.,

Defendants, Appellees.

ORDER OF COURT

Entered February 11, 1981

Upon consideration of appellants' motion to recall mandate.

It is ordered that said motion is hereby denied.

By the Court:

s/ Dana H. Gallup
Clerk.

[cc: Messrs. Tobin, Ostrach and McCarthy.]

APPENDIX B — MOTION

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

CIVIL ACTION NO-1280

ROSLINDALE CO-OPERATIVE BANK, OF BOSTON, MASS., ET ALS

Plaintiffs-Appellants

vs.

CAROL S. GREENWALD, ET ALS,

Defendants-Appellees

MOTION TO RECALL MANDATE

And now comes the plaintiffs and moves the Court to recall its mandate to allow the plaintiffs to file the Motion for a Protective Order to order the defendant Central Co-Operative Bank to advance to the Roslindale Co-Operative Bank, funds that it has in its possession, to enable the Roslindale Co-Operative Bank and its directors, (other than A. Tobin and R. Tobin) to obtain due process from the Supreme Court of the United States.

The directors of the Roslindale Co-Operative Bank say the law imposes upon them a fiduciary duty to the thousands of shareholders of the Roslindale Bank, to fight the liquidation order of the defendant Greenwald of the financially sound, Roslindale Bank. *Anderson v. Great Republic Life Insurance Co.*, ____Cal. ____, 106 P. 2nd 75, (1940). *Watson v. Johnson*, 174 Wash. 12, 24 P. 2nd 592, 59 A.L.R. 1527, (1933).

The directors say that for three years the bank's assets have been seized in full view of the United States District Court of

Massachusetts by virtue of the defendant's violations of an "emergency liquidation statute" without any form of administrative due process afforded to the Roslindale Bank.

That for three years the Roslindale Bank has been financially solvent and has been seized and continued in business in an arbitrary, capricious and malicious abuse of the defendant's purported emergency powers in clear violation of constitutional law, receivership law, and statutory law that was enacted by the legislature to safeguard the constitutional rights of the citizens of Massachusetts in adjudicatory matters.

Counsel for the Roslindale Co-Operative Bank has been prosecuting the bank's claims without advances funds from the bank by "necessity" because of their fuduciary responsibility to the shareholders, their accepted elected offices, and the fact that Robert Tobin was general counsel at the time of the seizure three years ago.

Counsel states that during these three years it has been a great sacrifice to their personal life and to their professional life that they have performed their fiduciary duty.

Counsel say that they and the directors have diligently tried to obtain outside experienced counsel.

Counsel wishes to withdraw their appearance and cease their fiduciary responsibility due to the opinion of the Appellate Court of January 8, 1981. They intend however to continue to pursue their own rights to the fullest extent to clear their reputations from the "hearsay upon hearsay" cast upon them.

Counsel does not wish the contrived dishonor cast upon them by the conspiracies of the defendants to further prejudice the Appellate Court's thoughts, or for that matter the thoughts of the United States Supreme Court, over what the law is, or what the rights are, of the following parties:

Appendix B

1. The thousands of shareholder's of the Roslindale Co-Operative Bank, the only Community Bank left, in Roslindale due the state's policy on mergers.

2. The remaining eight "uncharged" directors, whose reputations have been tarnished because "no one in the bank could be trusted."

3. The three career banking officers, who have been discharged over a $19,000 loss created by a head teller that was fired in April and not them. Two were fired without a hearing (they had received a hearing by the directors prior to Oct. 28 and not fired) and one fired one year later, because he testified truthfully at the M.G.L. c. 167 sec. 5 hearing, and also was elected Treasurer after the seizure by the shareholders.

4. The Banking Industry of Massachusetts that will in the future have to live with the pronouncement of the court that the defendants should have "unfettered freedom" to violate all of the laws of Massachusetts and of the United States.

Counsel would like to make the record clear that if in the future they represent any of the above parties they do so by necessity because of their fiduciary duties and not as a matter of choice.

Respectfully submitted,

Albert G. Tobin,
Tobin and Tobin,
735 South St.,
Roslindale, Mass. 02131
325-1010

Filed Jan. 30, 1981

APPENDIX C — AMENDED DECISION DATED JANUARY 8, 1981

United States Court of Appeals
For the First Circuit

No. 80-1280

ROSLINDALE COOPERATIVE BANK ET AL.,

PLAINTIFFS, APPELLANTS,

v.

CAROL S. GREENWALD ET AL.,

DEFENDANTS, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
(HON. RYA W. ZOBEL, *U.S. District Judge*)
[481 F.Supp. 749]

Before
COFFIN, *Chief Judge*,
ALDRICH and BOWNES, *Circuit Judges*.

Robert H. Tobin, with whom *Tobin and Tobin* was on brief, for appellants.

Stephen S. Ostrach, Assistant Attorney General, with whom *Francis X. Bellotti*, Attorney General, was on brief, for State appellees.

John J. McCarthy, with whom *Stanley V. Ragalevsky*, and *Warner & Stackpole* were on brief, for The Central Bank defendants.

January 8, 1981

ALDRICH, *Senior Circuit Judge*. On October 28, 1977 Carol Greenwald, Massachusetts Commissioner of Banks, pursuant to Mass. G.L. c. 170 App. §§ 2-4 certified to the Cooperative Central Bank (Central Bank) that it appeared to her "unsafe and inexpedient" for the Roslindale Cooperative Bank (the Bank) to continue to transact its business. The Bank is a mutual cooperative bank organized under Mass. G.L. c. 170.

* Previously released in unpublished form and judgment entered on November 21, 1980

Central Bank is the reserve bank for all Massachusetts cooperative banks. Mass. G.L. c. 170 App. §§ 1-1 *et seq.* In accordance with the statutory procedure Central Bank took immediate possession and control of the Bank's assets and business in place of its officers and directors, who were notified of this action on November 2. It is still in such control.

A year later Greenwald commenced administrative proceedings under Mass. G.L. c.167 § 5 to remove five of the Bank's twelve directors, one of whom forthwith resigned. Plaintiffs having been notified and given a bill of particulars at least a month in advance, a show cause hearing was held beginning on December 8, 1978, attended by Greenwald, the directors and their counsel, and a three-member statutory board.[1] Following a ten day hearing, on January 4, 1979 Greenwald issued a 56 page opinion summarizing the evidence and citing numerous infractions, including operation of the Bank in an unsafe and unsound manner, negligence, and in the case of two directors, direct violations of the banking laws and self-dealing. She therefore removed all four. Her decision was upheld a week later by the three member board, who, having sat through the hearings, were fully informed.

The Bank purportedly, and its president Albert Tobin,[2] brought an action in the state court promptly after the certification. The Bank's claim was dismissed without prejudice on the ground that neither its attorney[3] nor its president was authorized, as required by Massachusetts law, to bring the suit on its behalf. Tobin's individual claim was dismissed because he had not exhausted available administrative remedies. The Supreme Judicial Court affirmed in a rescript opinion. *Tobin* v. *Commissioner of Banks*, 1979 Mass. A.S. 498, 386 N.E.2d

[1] The board consisted of designees of the state treasurer, the attorney general, and the commission of corporations and taxation, as required by the statute.

[2] Tobin was one of the four later removed as officers and directors.

[3] Robert Tobin, Albert's brother and another of the directors later removed.

1246. So far as appears, neither the Bank nor Tobin proceeded further in the state court.

On January 11, 1978 the Bank and eleven of its directors filed the present action under 42 U.S.C. § 1983, seeking injunctive relief and damages. After allowing several amendments, chiefly to reflect the developments in the removal proceedings, the court dismissed the complaint for failure to state a claim, except for a count brought by the four removed directors. 481 F.Supp. 749. In due course this latter count was dismissed on summary judgment. Both actions were correct.

Plaintiffs have done much to complicate a basically simple case. The five volume Appendix contains almost two dozen of their motions and slightly more affidavits. Their brief on appeal cites over ninety cases, over thirty Massachusetts statutes, and a substantial number of federal statutes and rules. Their contentions are equally diverse. Some are merely irrelevant.[4] Some are indecipherable.[5] Even most charitably, some we can only describe as silly.[6] Most consist simply of conclusory and unsubstantiated allegations. With so much space and attention given to such matters, even a court with unlimited time and patience would run a serious risk of being distracted from a party's good points, if any there were. In fact — we hope not for that reason — we find none.

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[4] *E.g.*, the observation that "Jailers have also been found liable under 42 U.S.C. 1983."

[5] *E.g.*, that "M.G.L. c. 170 Sec. 4 and 5, is unconstitutional due to the conflict of interest of its members who have a paramount self-interest and are not impartial as they are subject to the Commissioner in their paramount interest, their other bank."

[6] *E.g.*, that defendants "have secretly communicated with each other about plaintiffs' affairs," and, by way of elaboration, that defendants "conspired . . . to gather evidence against the plaintiffs . . . causing a report to be prepared containing evidence to be used against the plaintiffs." We may wonder how defendants, who include the Commissioner and Deputy Commissioner of Banks, the officers of Central Bank, the State Treasurer, and the Attorney General, are expected to conduct their affairs, let alone defend this lawsuit brought against them jointly.

The Bank's claim that it was entitled to a hearing prior to certification is effectively disposed of by one of the authorities it cites. *Fahey* v. *Mallonee*, 1947, 332 U.S. 245, 253-54; *see also Fuentes* v. *Shevin*, 1972, 407 U.S. 67, 90-91 & n.23; *Coffin Bros.* v. *Bennett*, 1928, 277 U.S. 29; *Federal Deposit Ins. Corp.* v. *American Bank Trust Shares*, 4 Cir., 1980, F.2d . The drastic consequences of bank failure or mismanagement and "the impossibility of preserving credit during an investigation," *Fahey*, ante, 332 U.S. at 253, call for prompt and decisive action and place this proceeding among the "extraordinary situations" in which notice and hearing may be postponed until after seizure. *Fuentes*, ante, 407 U.S. at 90-91 & n.23.

As for a post-event hearing, Mass. G.L. c. 167 § 33 provides for review in the Supreme Judicial Court "[w]henever any bank of whose property and business the commission has taken possession deems itself aggrieved thereby" and files within ten days. In point of fact, while this section originally covered cooperative banks, *see Lowell Cooperative Bank* v. *Cooperative Central Bank*, 1934, 287 Mass. 338, 344-46, 191 N.E. 921, 924-25, it does no longer. Mass. G.L. c. 170 App. 2 § 10. However, the broad provisions of the Massachusetts Declaratory Judgment Act, Mass. G.L. c. 231A, afforded plaintiffs an avenue for relief. *See Tobin* v. *Commissioner of Banks*, ante, 1979 Mass. A.S. at 499 n.3, 386 N.E.2d at 1248 n.3; *Canney* v. *Municipal Court*, 1975, 368 Mass. 648, 335 N.E.2d 651; *Franklin Fair Ass'n* v. *Secretary of the Commonwealth*, 1964, 347 Mass. 110, 196 N.E.2d 622. The Bank, purportedly, and Albert Tobin did start down this road, and were dismissed on valid, non-pretextual grounds. They have not explained their failure to pursue the matter further.

The availability of the statutory proceeding satisfies the requirements of due process. *Federal Deposit Ins. Corp.* v. *American Bank Trust Shares*, ante. We cannot be sympathetic

to a party who elects to forego the hearing provided him, and then complains he received none. This is not a case of an invasion of plaintiffs' substantive civil rights, where they would have the option of seeking federal rather than state redress. *Monroe* v. *Pape*, 1961, 365 U.S. 167, 183. Rather, their complaint is lack of due process, viz., the absence of a hearing. Since a sufficiently timely hearing was available to them, they cannot bootstrap themselves into the federal court by failing to seek it.

Nor can the individual plaintiffs complain of the removal procedure under chapter 167 § 5. That section provides for notice and a reasonable opportunity to be heard prior to removal,[7] with post-termination review by the statutory three-member board and, subsequently, in the Supreme Judicial Court. These provisions are constitutionally generous; plaintiffs' facial attack is frivolous.

There remains only plaintiffs' contention that defendant Greenwald so conducted the proceeding as to deny them a fair opportunity to be heard. This claim survived defendants' motion to dismiss. 481 F.Supp. at 755-56. In support of her subsequent motion for summary judgment, Greenwald submitted her affidavit, together with the record of the proceedings. The affidavit summarized the course of events and denied any animus toward plaintiffs. The record amply refutes the directors' allegations that they were given inadequate notice (a month's formal; nearly two months' more informal), and access to evidence and the opportunity to cross-examine witnesses.[8] It also sheds light on their contention that none of

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[7] We have recently indicated that, as in the case of certification, even a post-termination hearing, if prompt, would be sufficient. *Rodriguez de Quinonez* v. *Perez*, 1 Cir., 1979, 596 F.2d 486, 490-91, *cert. denied*, 444 U.S. 840.

[8] Plaintiffs were allowed extensive cross-examination of the Division's witnesses, but chose to spend much of their time (and to interrupt the direct testimony as well) with lengthy speeches by the Tobins charging persecution at the hands of the Division.

the discharged directors was allowed to take the stand except Albert Tobin, who was allowed only one hour. Plaintiffs were repeatedly told they would have four days following the Division's presentation to put on their substantive case. They waited until the fourth day of their witnesses to complain that they themselves had not been heard. The hearing was extended through the following morning; plaintiffs continued with another witness until 11:30 A.M., when Albert Tobin took the stand. His testimony consisted of a 96 page document which he submitted as his statement for the record. None of the others testified. The record abundantly demonstrates that plaintiffs received an adequate opportunity to be heard. How they chose to exercise it was their affair.

Finally, we are surprised, in the light of the evidence, that plaintiffs could think they had legitimate complaints against the Commissioner's findings of mismanagement, self-dealing and illegality. The affidavits of Albert Tobin, to the extent that they purport to bear on the issues, are merely conclusory reiterations of the allegations of the complaint, and even at that are often not made on personal knowledge. They are insufficient. F.R.Civ.P. 56(e). Plaintiffs have failed to show the existence of any genuine issue for trial, and summary judgment was rightly entered.[9]

Affirmed.

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[9] We are aware that plaintiffs have sought to raise a number of other points. They require no discussion.

APPENDIX D — DECISION DATED MARCH 25, 1980

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 78-111-Z

ROSLINDALE COOPERATIVE BANK, et al.

vs.

CAROL GREENWALD, et al.

MEMORANDUM OF DECISION

ZOBEL, D.J.

On December 7, 1979, I entered an order in this action, brought pursuant to 42 U.S.C. §1983, granting certain of the defendants' motions to dismiss the complaint. The only claims which survived that order are those of Albert Tobin, Robert Tobin, Leonard DeLosh, and James Quinn against Carol S. Greenwald, formerly the Massachusetts Commissioner of Banks, for due process violations which allegedly occurred in the course of an administrative hearing over which Greenwald presided. The hearing, instituted at Greenwald's instance pursuant to Mass. Gen. Laws ch. 167, §5, resulted in the removal of plaintiffs from their positions as directors of the Roslindale Cooperative Bank (the Bank). In her answer, Greenwald denies the occurrence of any of the claimed constitutional violations, advances an immunity defense, and urges that this court abstain from review of the removal proceedings because such review is pending in an action before the Massachusetts Superior Court (*DeLosh, et al. v. Commissioner of Banks*, Suffolk Superior Court Docket No. 33144). Greenwald also counterclaims for abuse of process, and she requests an award of costs and of the reasonable value of the services rendered by assistant attorneys general who have conducted her defense. The case is before me on Greenwald's motion for summary judgment.

In the amended complaint (Counts I and 4), plaintiffs allege that Greenwald committed numerous procedural errors which in

plaintiffs' view, deprived them of their right to a fair removal hearing. They also claim that personal bias and vindictiveness motivated Greenwald's allegedly unconstitutional conduct. Greenwald, in an affidavit submitted in support of her motion for summary judgment, denies such animus and relies upon the transcript of the hearing* and her report of findings as conclusive refutations of plaintiffs' assertions of unconstitutional procedures.

When threatened with removal from their bank directorships, plaintiffs were entitled to an opportunity to clear their names and answer the charges made against them. *Codd v. Velger*, 429 U.S. 624, 626-27 (1977); *Rodriguez de Quinonez v. Perez*, 596 F.2d 486, 490-91 (1st Cir. 1979). The thirteen-volume transcript of the ten-day proceedings shows that plaintiffs were abundantly afforded such an opportunity. During the first six days of the hearing the Banking Division adduced evidence against plaintiffs; however, much of this time was consumed by plaintiffs' lengthy cross-examination of the Division's two witnesses. During the remaining four days plaintiffs called five witnesses. The last day was also devoted to rebuttal testimony by the Banking Division's third witness and to closing arguments by both sides. Plaintiffs had a fair chance to confront the substance of the charges made against them, and Greenwald repeatedly encouraged them to address the substantive issues efficiently. That plaintiffs chose to fritter away so much of the opportunity extended them by injecting personal invective and launching

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* Plaintiffs attack the documents submitted in support of Greenwald's motion for summary judgment. They move for a "protective order" and to strike the certification by Paul E. Bulman, Deputy Commissioner of Banks, that the documents submitted comprise the entire record of the removal proceedings on the ground that neither Paul E. Bulman nor anyone else was appointed clerk for the proceedings in accordance with state law. Insofar as these motions address the authentication of the record, they are denied as the documents have been fully authenticated. A registered professional reporter duly certified the accuracy of the transcript, and Greenwald in her affidavit attests the accuracy of the copy of her decision. Insofar as plaintiffs' motions concern alleged violations of state law, they do not address the only issue in this proceeding—whether the hearing comported with Due Process requirements. Accordingly, both the motion to strike the certification by Paul E. Bulman and for a "protective order" are denied.

frivolous arguments into the midst of an evidentiary hearing was their decision. The record controverts their claim of undue curtailment of the proceedings by Greenwald.

Plaintiffs' further assertion that they received untimely and inadequate notice of the hearing flies in the face of the record. The removal hearings were scheduled to begin December 1, 1978. Plaintiffs Albert Tobin, Robert Tobin, and Leonard DeLosh were formally notified of the hearing date on November 1, 1978, Quinn on November 8, 1978. The notice included a bill of particulars detailing the specific charges against the directors. Moreover, as Greenwald states in her affidavit, plaintiffs were aware of the matters contained in the bill of particulars as a result of an earlier meeting with the entire Board of Directors of the Bank convened on September 11, 1978 pursuant to Mass. Gen. Laws ch. 167, §2A; on November 28, 1978, Greenwald and other Banking Division officials met with plaintiffs for a pre-hearing conference at which "an attempt was made to narrow the areas of factual dispute, to exchange lists of witnesses, and to provide plaintiffs with copies of all the documents which would be offered against them." Plaintiffs sought and received a postponement of the hearing which eventually commenced December 8, 1978. In light of these uncontested facts, plaintiffs' assertions of defective notice are frivolous.

Plaintiffs have also set forth claims that their ability to defend themselves was impaired by Greenwald's failure to grant them access to evidence. The record, however, does not bear out these allegations either, and plaintiffs have pointed to no instance of prejudice resulting to them from any obstructive conduct by Greenwald. The record also discredits plaintiffs' allegations that they were not permitted the assistance of their chosen counsel—assuming that they had such a right—or an effective opportunity to cross-examine witnesses.

As a matter of constitutional law, the only question before me is whether plaintiffs were afforded a fair opportunity to answer the charges against them. Greenwald has come forward with materials clearly showing that such an opportunity was

extended plaintiffs, and plaintiffs have produced no affidavits or other documents to suggest that there is a genuine issue for trial with respect to the constitutionality of the procedures followed by Greenwald. Such affidavits as plaintiffs have submitted merely reiterate in conclusory terms the allegations in the complaint. They are, therefore, inadequate for purposes of Fed. R. Civ. P. 56(e). *Hahn v. Sargent,* 388 F. Supp. 445 (D. Mass. 1975), *aff'd,* 523 F.2d 461 (1st Cir. 1975), *cert. denied,* 425 U.S. 904 (1976). Having determined that the removal hearing conformed with Due Process requirements, I need not address the numerous allegations of noncompliance with ancillary features of state law. Nor do I regard as relevant the allegations of Greenwald's bias and malice. Whatever sentiments Greenwald may have brought with her to the proceedings, the end result was a fair, constitutionally adequate administrative proceeding. Challenges to the sufficiency of the evidence upon which Greenwald rendered her decision or to the soundness of her evidentiary rulings are not within the subject matter jurisdiction of this court but may be, and are being, pursued by plaintiffs in accordance with their statutory right of appeal within the state court system. See Mass. Gen. Laws ch. 167, §5.

Since plaintiffs have not shown that a genuine issue exists for trial and Greenwald is entitled to judgment as a matter of law with respect to her conduct of the removal hearing, Greenwald's motion for summary judgment is allowed. There being no just reason for delay, judgment may be entered pursuant to Rule 54(b) Fed. R. Civ. P. 28 U.S.C., for defendant Greenwald.

March 25, 1980
DATE

s/ R.W. Zobel
DISTRICT JUDGE

APPENDIX E — ROSLINDALE COOPERATIVE BANK, ET AL. v. CAROL GREENWALD, ET AL., 481 F. SUPP. 749 (1979)

ROSLINDALE COOPERATIVE BANK et al.

v.

Carol GREENWALD et al.

Civ. A. No. 78-111-Z.

United States District Court, D. Massachusetts.

Dec. 7, 1979.

Bank and directors and shareholders brought civil rights action charging the Massachusetts Commissioner of Banks and others with violations of Fourteenth Amendment due process guarantees. The District Court, Zobel, J., held that: (1) complaint failed to state a cause of action for deprivation of constitutional rights resulting from certification by Commissioner that it appeared to her unsafe and inexpedient for bank to continue to transact its business, and (2) if show cause hearing for removal of bank director was conducted in a way which effectively denied removed directors an opportunity to refute such charges, they would be entitled to relief for deprivation of constitutional rights.

Motions to dismiss allowed in part and denied in part.

1. Constitutional Law

Bank and its directors had liberty or property interests affected by certification by former Massachusetts Commissioner of Banks that it appeared to her "unsafe and inexpedient" for bank to continue to transact its business, which interests would entitle bank and directors to procedural safeguards guaranteed by due process clause. U.S.C.A. Const. Amend. 14.

Appendix E

2. Civil Rights

Bank was entitled to maintain an action under section of Civil Rights Act providing for civil actions for deprivation of rights, despite claim that it could not do so as a creature of the state. 42 U.S.C.A. §1983.

3. Civil Rights

Directors of bank had standing to institute civil rights action in name of bank challenging a certification decision and claiming that such amounted to deprivation of constitutional rights. 42 U.S.C.A. §1983; U.S.C.A. Const. Amend. 14.

4. Constitutional Law

Where, since certification, shareholders' duly elected board of directors had not been in control of bank and where defendants had ignored operative effect of two shareholder votes, shareholders had property interest adequate to sustain their claims that certification by former Massachusetts Commissioner of Banks that it appeared to her "unsafe and inexpedient" for bank to continue to transact its business, resulting in second bank's taking possession and control of bank's property and business and assuming director's managerial responsibilities, denied shareholders' constitutional rights. 42 U.S.C.A. §1983; U.S.C.A. Const. Amend. 14.

5. Constitutional Law

Whether corporation directors have constitutionally protectable property interests must be determined by reference to state law; similarly, existence of liberty interests in directorships depends upon state law. U.S.C.A. Const. Amend. 14.

6. Banks and Banking

Under Massachusetts law, bank director may be removed

for official delinquencies only after notice and an opportunity to refute the charges of impropriety.

7. Civil Rights

A Massachusetts bank directorship does constitute an interest which if denied contrary to due process requirements would entitle plaintiffs to relief under section of Civil Rights Act providing for civil action for deprivation of rights. 42 U.S.C.A. §1983; U.S.C.A.Const. Amend. 14.

8. Banks and Banking

Potentially drastic effects of bank failure or mismanagement justify unfettered freedom of state action and warrant no requirement of a precertification hearing either with respect to bank or the shareholder. U.S.C.A.Const. Amend. 14.

9. Constitutional Law

Availability of equitable postcertification relief under Massachusetts General Laws meets all requirements of due process in context of bank certification. M.G.L.A. c. 170 App. §2-4; U.S.C.A.Const. Amend. 14.

10. Banks and Banking

Certification powers are delegated to the Massachusetts Bank Commissioner by the legislature and are not subject to judicial review except to extent of determining whether the Commissioner exceeded statutory bounds of her authority. M.G.L.A. c. 170 App. §2-4.

11. Banks and Banking

Language in Massachusetts statute providing that the Massachusetts Bank Commissioner may certify a bank only if she finds that it is in unsound or unsafe condition or that it is unsafe and inexpedient for bank to continue its business refers

to commonly accepted banking standards which afford a reviewing court sufficiently precise means for evaluating the Commissioner's action. M.G.L.A. c. 170 App. §2-4.

12. Banks and Banking

Certification standards set forth by Massachusetts statutes are neutral and impose no statutory imprimatur of personal dishonesty such as would trigger requirement of a hearing. M.G.L.A. c. 170 App. §2-4.

13. Civil Rights

In light of fact that Massachusetts bank certification standards and procedures met constitutional standards and fact that it was still possible that bank's business would be restored to full managerial powers of its directors, complaint alleging that certification by former Massachusetts Commissioner of Banks that it appeared to her unsafe and inexpedient for bank to continue to transact its business resulted in deprivation of directors' constitutional rights failed to state cause of action. 42 U.S.C.A. §1983; U.S.C.A.Const. Amend. 14.

14. Civil Rights

In light of concentration of all discretionary powers exercisable in connection with bank certifications with Massachusetts Commissioner of Banks, complaint alleging that certification by former Massachusetts Commissioner of Banks, resulting in second bank's taking possession and control of first bank's property and business and assuming the directors' managerial responsibilities, resulted in denial of bank directors' constitutional rights failed to state cause of action with respect to second bank and its directors. M.G.L.A. c. 167 §1 et seq.; c. 170 §1 et seq.; c. 170 App.-§§2-4, 2-5; 42 U.S.C.A. §1983.

15. Civil Rights

Complaint alleging that Deputy Commissioner of Banks of Massachusetts deprived bank directors of their constitutional

rights by his involvement in certification that it appeared unsafe and inexpedient for bank to continue to transact its business failed to state cause of action inasmuch as no allegations appeared in complaint to suggest that deputy commissioner's role exceeded bounds of his ministerial functions. 42 U.S.C.A. §1983; U.S.C.A.Const. Amend. 14; M.G.L.A. c. 170 App. §2-4.

16. Banks and Banking
Constitutional Law

Massachusetts statute providing for administrative proceedings to remove bank directors satisfies due process requirements by guaranteeing notice and a hearing to bank directors charged with professional malfeasance. M.G.L.A. c. 167 §5.

17. Civil Rights

Complaint alleging that show cause hearing for removal of bank directors was conducted in a way which effectively denied removed directors an opportunity to refute such charges stated cause of action for deprivation of constitutional rights. M.G.L.A. c. 167 §5; 42 U.S.C.A. §1983; U.S.C.A.Const. Amend. 14.

18. Officers and Public Employees

Qualified immunity of executive department officials extends to all official acts which have reasonable basis in light of all circumstances existing at time action was taken, including scope of official discretion, and which are the product of a good faith effort to discharge official responsibilities; if, however, an executive official acts without reason and for purpose of causing injury to plaintiff, cloak of immunity is withdrawn, and official may be charged with monetary liability.

19. Civil Rights

Plaintiff alleging cause of action against executive

department officials under section of Civil Rights Act providing for civil action for deprivation of rights must plead as well as prove facts showing bad faith. 42 U.S.C.A. §1983.

20. Officers and Public Employees

Deputy Commissioner of Banks of State of Massachusetts was absolutely immune from liability for alleged wrongful actions pertaining to his participation in decision to initiate removal proceedings against bank directors and for his prosecutorial role at show cause hearing. 42 U.S.C.A. §1983; M.G.L.A. c. 167 §5.

21. Banks and Banking

Massachusetts Commissioner of Banks who, under statute, bears responsibility for conduct of hearing for removal of bank directors alone is accountable for constitutional defects in proceeding. M.G.L.A. c. 167 §5.

22. Civil Rights

Complaint alleging that Attorney General, State Treasurer, and Massachusetts Commissioner of Revenue, as members of review board which did not reverse former Commissioner of Banks' order of removal of directors, had violated directors' constitutional rights failed to state cause of action. M.G.L.A. c. 170 App. §2-4.

23. Civil Rights

Complaint alleging that Commissioner of Banks deprived bank director of due process because, for example, he refused a request to have counsel present at meeting, failed to state cause of action inasmuch as there was nothing in complaint to indicate that meeting implicated any constitutional interest to which due process attaches but, rather, it appeared that meeting was part of plan to accomplish eventual return of bank to its board of directors. M.G.L.A. c. 170 App. §2-4; 42 U.S.C.A. §1983.

Robert H. Tobin, Roslindale, Mass., for plaintiffs.

Thomas v. Urmy, Jr., Warner & Stackpole, Boston, Mass., for Cooperative Central Bank.

Andrew J. McElaney, Asst. Atty. Gen., Boston, Mass., for Greenwald and Flynn.

MEMORANDUM OF DECISION

ZOBEL, District Judge.

Roslindale Cooperative Bank and eleven of its directors and shareholders bring this civil rights action pursuant to 42 U.S.C. §1983 charging the Massachusetts Commissioner of Banks and others with violations of Fourteenth Amendment due process guarantees. The several defendants named in the complaint are Carol S. Greenwald, former Massachusetts Commissioner of Banks and her successor in office, Gerald T. Mulligan; Edward T. Flynn, Deputy Commissioner of Banks; Cooperative Central Bank (Central Bank), the reserve bank for Massachusetts cooperative banks, and Central Bank's board of directors; and the Attorney General, State Treasurer, and Commissioner of Revenue.

Plaintiffs' amended complaint concerns essentially two series of events. On October 28, 1977, Greenwald, pursuant to Mass.Gen.Laws ch. 170 App., §2-4, certified to Central Bank that it appeared to her "unsafe and inexpedient" for Roslindale Cooperative Bank (the Bank) to continue to transact its business. In response to the certification, Central Bank took possession and control of the Bank's property and business and assumed plaintiff directors' managerial responsibilities. Plaintiffs did not learn of Greenwald's certification until November 2, 1977 when they received a letter from Central Bank simultaneously informing them of Greenwald's action and Central Bank's intervention. The Bank, to this day, remains under the control of Central Bank.

Appendix E

The second series of events began approximately one year later, when Greenwald, pursuant to Mass.Gen.Laws ch. 167, §5, initiated administrative proceedings to remove four of the plaintiffs, Albert G. Tobin, Robert H. Tobin, Leonard F. DeLosh, and James Quinn, from the Bank's board of directors. Plaintiffs allege that at a show cause hearing conducted by Greenwald, they appeared to answer charges of professional misconduct. The charges were presented by Deputy Commissioner Flynn. As required by ch. 167, §5, the hearing also was attended by a three-member board consisting of designees of the Attorney General, State Treasurer, and Commissioner of Revenue. At the conclusion of the hearing, Greenwald ordered removal of the directors. The board, though empowered by statute to do so, did not overrule her decision.[1] Plaintiffs bitterly criticize the manner in which the hearing was conducted alleging, *inter alia,* that they were not notified of the specific charges they would be expected to refute and that only one of the four was permitted to speak in his own behalf.

The Bank and its directors and shareholders now seek compensatory and punitive damages, an injunction ordering return of the Bank's property and business to the directors' control, and a declaration that ch. 170 App., §2-4, the certification statute, is unconstitutional, as well as other relief, arguing they were denied their constitutional rights to notice and a hearing on the advisability of certification. The removed directors claim they are entitled to compensatory and punitive damages, and reinstatement, because of allegedly unconstitutional defects in the removal proceedings, and a declaration that ch. 167, §5, the removal statute, is unconstitutional. The defendants have moved to dismiss the complaint for failure to state a claim. Fed.R.Civ.P. 12(b)(6).

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1. The board does not have full powers of review but simply has the limited statutory authority to reverse the Commissioner's order by a majority vote of its members. Mass.Gen.Law ch. 167, §5.

Appendix E

Certification

[1-3] Defendants argue that plaintiffs have no "liberty" or "property" interests which would entitle them to the procedural safeguards guaranteed by the Due Process clause. I disagree. Certification removed the Bank's assets and placed them under the control of Central Bank. Clearly the Bank has a property interest in its assets. Moreover, defendants' argument that the Bank as a creature of the state is not entitled to maintain a §1983 action is not a correct statement of the law. *Advocates for Arts v. Thompson,* 532 F.2d 792, 794 (1st Cir. 1976); *Pennsylvania Bank and Trust Co. v. Hanisek,* 426 F.Supp. 410, 412-13 (W.D.Pa.1977).[2]

[4] Plaintiffs, as shareholders, also have property interest adequate to sustain their claims. Since certification, the shareholders' duly-elected board of directors have not been in control of the Bank, and as the complaint further alleges defendants have ignored the operative effect of two shareholder votes. Under these circumstances, the shareholders are entitled to due process protection. See, *Feinberg v. Federal Deposit Ins. Corp.,* 173 U.S.App.D.C. 120, 125, 522 F.2d 1335, 1340 (D.C.Cir.1975); *Feinberg v. Federal Deposit Ins. Corp.,* 420 F.Supp. 109, 115 (D.D.C.1976) (where a holder of shares in a state bank was held entitled to due process). But see, *Smith v. Witherow,* 102 F.2d 638 (3d Cir. 1939) (where holders of

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2. I also disagree with defendants that the directors lack standing to maintain this action in behalf of the Bank. Relying on *Vigilante v. Old South Trust Co.,* 251 Mass. 385, 387-388, 146 N.E. 670 (1925), defendants argue that only Central Bank can authorize litigation in the name of a certified member bank. It does not necessarily follow, however, that the directors should be precluded from instituting a civil rights action in the name of the Bank for deprivations of its constitutional interests. See, *Fahey v. Mallonee,* 332 U.S. 245, 67 S.Ct. 1552, 91 L.Ed. 2030 (1945). Indeed, as the Supreme Judicial Court has indicated, the fact that *Vigilante* applies to all of the *business* affairs of a certified bank does not preclude the board of directors from challenging a certification decision by means of a suit for declaratory or injunctive relief. *Tobin v. Commissioner of Banks,* ___ Mass. ___, 386 N.E.2d 1246, 1248, n.3 (1979).

national banking shares were denied constitutional protection in light of express statutory conditions imposed upon their ownership interests).

[5-7] Whether the directors have a constitutionally protectible property interest must be determines by reference to state law. *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972); *Bishop v. Wood*, 426 U.S. 341, 345-46, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976). Similarly, the existence of a liberty interest in the directorships depends upon state law. *Paul v. Davis*, 424 U.S. 693, 709-710, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976). Under Massachusetts law, a bank director may be removed for official delinquencies only after notice and an opportunity to refute the charges of impropriety. *Tobin v. Commissioner of Banks*, 386 N.E.2d 1246, 1248 (1979); Mass.Gen.Law ch. 167, §5. A Massachusetts bank directorship does, therefore, constitute an interest which if denied contrary to due process requirements would entitle plaintiffs to relief.

[8-12] The next question to be resolved is whether plaintiffs' respective constitutional interests are adequately safeguarded by procedures available to them under state law and this question must be answered affirmatively. The potentially drastic effects of bank failure or mismanagement justify unfettered freedom of state action and warrant no requirement of a pre-certification hearing either with respect to the Bank, see *Fahey v. Mallonee, supra*, or the shareholders, *Feinberg v. Federal Deposit Ins. Corp., supra*, 420 F.Supp. at 119-120. Post-certification relief is a different matter, however, although it may clearly be cast in a form which accommodates the regulatory concerns of the Commonweath as well as the respective interests of the Bank, *Fahey v. Mallonee, supra*, and its shareholders, *Feinberg v. Federal Deposit Ins. Corp., supra*, 420 F.Supp. at 119-120. The availability of equitable relief under Mass.Gen.Laws ch. 231A, see *Tobin v. Commissioner of Banks, supra*, 386 N.E.2d at 1248, n.3, meets all the requirements of due process in the context of bank certification. As the Supreme Judicial Court indicated in *Lowell Co-Operative Bank v. The Co-Operative Central Bank*, 287 Mass. 338, 191 N.E. 921 (1934),

certification powers are delegated to the Commissioner by the legislature and are not subject to judicial review except to the extent of determining whether the Commissioner exceeded the statutory bounds of her authority. The language in ch. 170 App., §2-4, providing that the Commissioner may certify a bank only if she finds that it is in "an unsound or unsafe condition" or that it is "unsafe and inexpedient" for the bank to continue its business refers to commonly accepted banking standards which afford a reviewing court sufficiently precise means for evaluating the Commissioner's action. *Fahey v. Mallonee, supra,* 332 U.S. at 252-53, 67 S.Ct. 1552.[3]

[13] A further reason compels dismissal of the claims of plaintiff directors arising out of certification of the Bank.[4] As both the complaint and the certification statute indicate, Greenwald's action with respect to the Bank did not terminate plaintiffs' directorships. It is still possible that the Bank's business will be restored to the full managerial powers of its directors. Indeed, it appears from the complaint that steps toward this end have been taken. In the absence of a conclusive termination of status, plaintiff directors cannot argue that they have been denied their constitutional rights. *Board of Regents v. Roth, supra; Paul v. Davis, supra,* 424 U.S. at 701-12, 96 S.Ct. 1155.

[14] With respect to Central Bank and its directors, the complaint fails for an additional reason. All discretionary powers exercisable in connection with bank certifications are vested in the Commissioner of Banks who alone has the

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3. The certification standards are also neutral and impose no statutory imprimatur of personal dishonesty such as that which triggered the requirement of a hearing in *Feinberg v. Federal Deposit Ins. Corp.*, 420 F.Supp. 109 (D.D.C. 1976) and *Rodriguez de Quinonez v. Perez*, 596 F.2d 486 (1st Cir. 1979).

4. Clearly, different issues are raised by the four directors who were formally removed pursuant to the ch. 167 procedures which, of course, are wholly separate and independent from certification procedures under ch. 170. See discussion *infra*.

statutory authority to certify banks, permit resumption of normal operations, or order liquidation. Mass.Gen.Laws ch. 170 App., §§2-4, 2-5. Section 1983 imposes liability only on those persons who subject others, or by their actions cause such others to be subjected, to constitutional injuries. 42 U.S.C. §1983 (1974). The role of Central Bank and its directors in this statutory scheme is purely ministerial: upon notification from the Commissioner that one of its member banks has been certified, Central Bank must intervene and must retain control of the certified member bank until further action by the Commissioner. The concentration of all discretionary powers in the Commissioner removes Central Bank and its board of directors from liability for damages under §1983. See e.g., *Mims v. Board of Education,* 523 F.2d 711, 715 (7th Cir. 1975).

[15] Plaintiffs' attempt to attribute liability to Deputy Commissioner Flynn is similarly misdirected. No allegations appear in the complaint to suggest that Flynn's role in these events exceeded the bounds of his ministerial functions, therefore, he also is absolved of liability. *Mims v. Board of Education, supra.*

Removal of Directors

[16,17] The only issues with respect to the removed directors, are whether ch. 167, §5 was applied to them in an unconstitutional manner and, if so, whether they are entitled to relief against any of the defendants. The statute itself satisfies due process requirements by guaranteeing notice and a hearing to bank directors charged with professional malfeasance, *Rodriguez de Quinonez v. Perez,* 596 F.2d 486 (1st Cir. 1979), but if, as the complaint alleges, the show cause hearing was conducted in a way which effectively denied the removed directors an opportunity to refute such charges, they would be entitled to relief, *Codd v. Velger,* 429 U.S. 624-27, 97 S.Ct. 882, 51 L.Ed.2d 92 (1977); *Rodriguez de Quinonez v. Perez, supra,* at 490-91.

[18] Insofar as the removed directors seek damages from Greenwald, their claim is circumscribed by the doctrine of

qualified immunity of executive department officials. *Scheuer v. Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974). This immunity extends to all official acts which have a reasonable basis in light of all the circumstances existing at the time action was taken, including the scope of official discretion, and which are the product of a good faith effort to discharge official responsibilities. *Id.*, at 247-48, 94 S.Ct. 1683. If, however, an executive official acts without reason and for the purpose of causing injury to plaintiff, the cloak of immunity is withdrawn, and the official may be charged with monetary liability. *Id.*

[19] The rule in this circuit is that a §1983 plaintiff must plead as well as prove facts showing bad faith. *Gomez v. Toledo*, 602 F.2d 1018, 1020 (1st Cir. 1979). The removed directors' assertions that they were denied notice and an effective opportunity to speak at their show cause hearing raise at least an inference of bad faith sufficient to meet their burden of pleading and to defeat Greenwald's motion to dismiss the complaint.

[20] Defendant Flynn's alleged wrongful actions against plaintiffs pertain to his participation in the decision to initiate the removal proceedings and for his prosecutorial role at the show cause hearing. He is absolutely immune from liability. *Butz v. Economou*, 438 U.S. 478, 98 S.Ct. 2894, 2915, 57 L.Ed.2d 895 (1978). Plaintiffs' allegations of conspiratorial liability, both as to Flynn and the other defendants, lack merit. *Griffin v. Breckenridge*, 403 U.S. 88, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971); *Harrison v. Brooks*, 519 F.2d 1358 (1st Cir. 1975).

[21,22] The liability of the Attorney General, State Treasurer, and Commissioner of Revenue rests on the sole allegation that, as members of the board constituted by ch. 167, §5, they did not reverse Greenwald's order of removal. The board's statutory power to reverse an order of the Commissioner does not make them guarantors of constitutional rights. Under the statute, the Commissioner bears responsibility for the conduct of the hearing; therefore, within the limits permitted by qualified executive immunity, she alone is accountable for constitutional defects in the proceedings. The role of the board is

restricted to the merits of a removal decision—as to which there is a right of judicial review in state court—and affords no basis for a constitutional claim. The complaint as to the board members, therefore, is groundless and may be dismissed.

[23] Four plaintiffs charge violations of their rights as a result of certain actions by defendant Mulligan. The complaint alleges that on June 25, 1979, Mulligan met with four of the plaintiff directors pursuant to Mass.Gen.Laws ch. 167, §2A which empowers the Commissioner of Banks to issue orders to bank directors concerning banking operations. Plaintiffs who were summoned to the §2A meeting, Beneditto A. Faletra, Jr., Charles Janotta, Harold T. Hourihan, and Joseph F. Marcantonio, claim Mulligan deprived them of due process, because, for example, he refused their requests to have counsel present. There is nothing in the complaint, however, to indicate that the §2A meeting implicated any of the constitutional interests to which due process attaches. Indeed, it appears from the complaint that the meeting was part of a plan to accomplish the eventual return of the Bank to its board of directors. Plaintiffs may take issue with Mulligan's judgment concerning the manner in which the return will happen, but this does not rise to the level of a constitutional claim.

Disposition

Defendants' motions to dismiss for failure to state a claim are allowed except that Greenwald's motion is denied as to claims made by Albert G. Tobin, Robert H. Tobin, Leonard F. DeLosh, and James Quinn in connection with the ch. 167, §5 removal proceedings.

APPENDIX F — TOBIN v. COMMISSIONER OF BANKS, 1979 MASS. A.S. 498, 380 N.E. 2D 1248 (1979)

Albert G. TOBIN et al.[1]

v.

COMMISSIONER OF BANKS, et al.[2]

Supreme Judicial Court of Massachusetts, Suffolk.

Argued Nov. 6, 1978.

Decided Feb. 28, 1979.

After Commissioner of Banks certified that it was unsafe and inexpedient for a bank to continue its present operation, the president of the bank brought an action challenging the Commissioner's actions. The Superior Court, Suffolk County, dismissed. The Supreme Judicial Court held that: (1) issue of whether striking of the appearance of the attorney for the plaintiff was proper was waived; (2) authority to file an action against the Commissioner on behalf of the bank was vested in the board of directors and not the president, and (3) president could not maintain suit challenging his removal before exhausting his administrative remedies.

Appeal dismissed in part and judgment affirmed in part.

1. Appeal and Error

Brief which did no more than state as an issue the striking of the appearance of attorney and, in conclusion, asked that the order be vacated contained insufficient appellate argument and the issue would be deemed waived. Rules of Appellate Procedure, rule 16(a)(4).

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1. Roslindale Co-operative Bank.

2. Co-operative Central Bank.

Appendix F

2. Banks and Banking

In the absence of a statute or a corporate bylaw, the authority to file an action against the Commissioner of Banks on behalf of the bank is vested in the board of directors and not in the president. M.G.L.A. c. 170 §8.

3. Banks and Banking

Board of directors of a cooperative bank is not precluded from challenging certification of the Commissioner of Banks that it is unsafe and inexpedient for the bank to continue in its present operation. M.G.L.A. c. 231A §§1, 2.

4. Banks and Banking

Before being removed as president of a bank upon the certification of the commissioner that it is unsafe and expedient for the bank to continue its operations, president has a statutory right to hearing before the commissioner, to review of the commisioner's decision by an administrative board composed of the state treasurer, the Attorney General, and the Commissioner of Revenue, and to judicial review of the removal decision. M.G.L.A. c. 167 §5.

5. Banks and Banking

Action brought by president of the bank challenging his removal by the Commissioner of Banks following the commissioner's certification that it was unsafe and inexpedient for the bank to continue its operations could not be maintained before the president resorted to his administrative remedies. M.G.L.A. c. 167 §5.

Robert H. Tobin, Roslindale, for Roslindale Co-operative Bank and another.

Andrew J. McElaney, Jr., Asst. Atty. Gen., for Commissioner of Banks.

Appendix F

John J. McCarthy, Wakefield, for Co-operative Central Bank.

Before HENNESSEY, C.J., and KAPLAN, WILKINS, LIACOS and ABRAMS, JJ.

RESCRIPT.

On October 28, 1977, the Commissioner of Banks certified to the Co-operative Central Bank (Central) that it was "unsafe and inexpedient" for the Roslindale Co-operative Bank (Roslindale) to continue its present operation and therefore Central was ordered to take possession and control of the property and business of Roslindale. See St.1934, c. 73, §4.

Roslindale's president, Albert G. Tobin, brought a complaint alleging that the Commissioner's actions were arbitrary and capricious and the certification was made "without just cause." The bank president also alleged an individual claim based on the Commissioner's action. The defendants filed a motion to strike the appearance of Roslindale's attorney on the ground that the attorney was not authorized to represent Roslindale. The judge struck the attorney's appearance, ruling that the "bank's claims in this case have been brought by an attorney who was not authorized to act in its behalf." He dismissed Roslindale's complaint *without prejudice* and entered a judgment to the effect that "there is no just reason for delay and upon an express direction for the entry of judgment." Mass.R.Civ.P. 54(b), 365 Mass. 820 (1974). See *New England Canteen Serv., Inc. v. Ashley*, ___ Mass. ___, ___[a], 363 N.E.2d 526 (1977).

[1] We need not decide whether the judgment entered is appealable, because on appeal, the plaintiff does no more than state as an issue the striking of the appearance of the attorney and, in his conclusion, he asks that the order be vacated. This is an insufficient appellate argument. Mass.R.A.P. 16(a)(4), as

a. Mass.Adv.Sh (1977) 1186, 1194.

amended, 367 Mass. 919 (1975). See, e.g. *Olsson v. Waite*, ___ Mass. ___, ___[b], 368, N.E.2d 1194 (1977); *Mahoney v. Board of Appeals of Winchester*, 366 Mass. 228, 233 (1974), appeal dismissed, 420 U.S. 903, 95 S.Ct. 822, 42 L.Ed.2d 834 (1975); *Ford v. Flaherty*, 364 Mass. 382, 387, 305 N.E.2d 112 (1973); *Lolos v. Berlin*, 338 Mass. 10, 14, 153 N.E.2d 636 (1958). This issue is therefore deemed waived. Thus, Roslindale's complaint is not before us and the appeal must be dismissed.

[2,3] Furthermore, in the absence of a statute or a corporate by-law, the authority to file an action against the Commissioner on behalf of the bank is vested in the board of directors, and not the president. See generally, G.L. c. 170 §8. Cf. *Kelly v. Citizens Fin. Co. of Lowell, Inc.*, 306 Mass. 531, 532, 28 N.E.2d 1055 (1940); *Mahone v. Manchester & Lawrence R.R. Corp.*, 111 Mass. 72, 75 (1872); *Ashuelot Mfg. Co. v. Marsh*, 1 Cush. 507, 508 (1848). Accord, *Pacific Bank v. Stone*, 121 Cal. 202, 208-209, 53 P. 634 (1898). The pleadings are devoid of any facts or any allegations concerning such authorization by Roslindale's board of directors.[3]

[4,5] The judge dismissed the president's individual claim on the ground that it failed to state a claim on which relief could be granted. See Mass.R.Civ.P. 12(b)(6), 365 Mass. 754 (1974). Before being removed, the plaintiff has a statutory right to a hearing before the Commissioner, review of the Commissioner's decision by an administrative board composed of the State Treasurer, the Attorney General and the Commissioner of Revenue and then judicial review of the removal decision. See G.L. c. 167, §5. Since the plaintiff brought suit before his

b. Mass.Adv.Sh. (1977) 2175, 2180.

3. We think that *Vigilante v. Old South Trust Co.*, 251 Mass. 385, 387-388, 146 N.E. 670 (1925), applies to all the bank's business, but does not, as the defendants suggest, preclude a co-operative bank's board of directors from challenging the Commissioner's certification of the bank either before the Commissioner or, in some circumstances, in court. See G.L. c. 231A, §§1, 2. See also *Samel v. Pittsfield Licensing Bd.*, ___ Mass. ___ (Mass.Adv.Sh. [1979] 117), 384 N.E.2d 1230. Cf. G.L. c. 167, §§22, 33.

removal and before resort to the required hearing, his complaint was rightly dismissed. See *Gallo v. Division of Water Pollution Control*, ___ Mass. ___, ___[c], 372 N.E.2d 1258 (1978); *J. & J. Enterprises, Inc. v. Martignetti*, 369 Mass. 535, 540-541, 341 N.E.2d 645 (1976); *Gordon v. Hardware Mut. Cas. Co.*, 361 Mass. 582, 587, 281 N.E.2d 573 (1972). Cf. *Lowell Gas Co. v. Attorney Gen.*, ___ Mass. ___, ___[d], 385 N.E.2d 240 (1979).

We conclude that the appeal from the granting of the motion to strike the appearance of the attorney acting on behalf of Roslindale has been waived. Therefore, that appeal is dismissed. As to the individual complaint, the judgment is affirmed.

So ordered.

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c. Mass.Adv.Sh. (1978) 195, 208.

d. Mass.Adv.Sh. (1979) 49, 58-59.

APPENDIX G — RELEVANT STATUTES AND CONSTITUTIONAL PROVISIONS

42 §1983. Civil action for deprivation of rights

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

R.S. §1979

§1985. Conspiracy to interfere with civil rights — Preventing officer from performing duties

(In pertinent part)

"Depriving persons of rights or privileges

> (3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws: . . ."

§1986. Same; action for neglect to prevent.

> "Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about

to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action; and if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action therefor, and may recover not exceeding $5,000 damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued."

R.S. §1981

C. 170 App'x 2

(In Effect on October 28, 1977)

§4. Taking Possession of Member Banks by Corporation.

"Whenever it shall appear to the commissioner that any member bank is in an unsound or unsafe condition to transact the business for which it is organized, or that it is unsafe and inexpedient for it to continue to transact such business, he may so certify to the corporation, and upon receipt of such certificate the corporation shall, by notice in writing to the commissioner and to the bank, take possession

and control forthwith of the property and business of such bank and shall operate such bank subject to such rules and regulations as the commissioner may impose until the bank shall resume business or until its affairs shall finally be liquidated. The corporation may, while thus carrying on such business, pay to such bank out of the Share Insurance Fund such sums as the corporation's directors deem necessary for the protection of the bank's shareholders, and may order the same to be repaid when no longer required for that purpose, or may purchase assets from said bank to effect the purposes of this chapter on such terms and conditions and at such valuations as the directors, with the approval of the commissioner, may determine." (1934, 73, §4.)

§5. Turning Back Control, etc., for Member Banks

"At any time after the corporation has taken over the control, possession and operation of any member bank as provided in section four, it may with the approval of the commissioner turn back the control, possession and operation thereof to such member bank which may resume business free from any control by the corporation acquired under section four, subject to such conditions as the commissioner may approve. The corporation shall not thus turn back the control, possession and operation of any bank until there has been repaid into the Share Insurance Fund all sums paid out by it from such fund to such bank or its shareholders or until it has received security for such repayment satisfactory to the directors of the corporation." (1934, 74, §5.)

C. 167 §5. Commissioner May Report and Prosecute Violations of Law; Publication of Certain Facts.

Appendix G

(In Effect in 1977 and 1978)

"If, in the opinion of the commissioner, any officer of any bank, including a director or trustee thereof, has violated any law relating to such bank or has conducted the business of such bank in an unsafe or unsound manner or has used his official position in a manner contrary to the interests of such bank or its depositors or has been negligent in the performance of his duties, the commissioner may, in his discretion, send a statement of facts about such conduct to the executive officer, and each director or trustee of the bank affected. Within such reasonable time as the commissioner may direct, a special meeting of the directors or trustees of the bank shall be held with respect to the statement of the commissioner. If, in the opinion of the commissioner, appropriate action is not taken to protect the interests of the bank or its depositors, or if such conduct is continued, the commissioner shall cause notice to be served on such officer, director or trustee to appear, and show cause why he should not be removed from office. A copy of such notice shall be sent by registered mail to each officer, director or trustee of the bank affected. A copy of such notice shall be sent to a board composed of the state treasurer, the attorney general, and the commissioner of revenue. The members of the board or a duly authorized representative shall be present at any appearance of such officer, director or trustee. If, after granting the officer, director or trustee so summoned as reasonable opportunity to be heard, the commissioner finds that he has been guilty of any such delinquency, the commissioner, in his discretion, may order that such officer, director, or trustee be removed from office and from participation in the management

of such bank. A decision by the commissioner to remove such officer, director or trustee may be reversed by a decision of the majority of the members of the board made within five business days after the commissioner's decision to remove; otherwise, any such decision of the commissioner shall be given full force and effect. Copies of such order shall be served upon the delinquent officer and upon such bank, whereupon such officer shall cease to be an officer of such bank and shall no longer participate in any way in the management thereof provided, that such order and the findings of fact upon which it is based shall not be made public or disclosed to anyone except the delinquent officer and the other officers, directors and trustees of such bank, otherwise than in the course of any judicial proceeding under this section. The commissioner shall thereupon transmit to the attorney general a transcript of the evidence and finding, and the attorney general shall, on behalf of the commonwealth, institute such proceedings as he may deem necessary. Any person removed from office as herein provided who thereafter participates in any manner in the management of any bank in the commonwealth shall be punished by imprisonment in the state prison for not more than five years or by a fine of not more than five thousand dollars, or both.

Within twenty days after the service of an order of removal under this section upon the person removed thereby, he may file a petition in the supreme judicial court for the county of Suffolk for a review of the removal but, pending such review, the order shall remain in full force and effect. The court shall have jurisdiction in equity to annul, reverse or affirm such order, shall review all questions in accordance with the

standards for review provided in paragraph (8) of section fourteen of chapter thirty A and may make any appropriate order or decree. The decision of the court shall be final and conclusive." (Amended by 1978, 514, §212, approved, with emergency preamble July 20, 1978; by §287, effective Aug. 1, 1978.)

Constitution of the United States, Amendment 14

"SECTION 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

M.G.L. c. 30A, §11A½

(Pertinent sections)

"To . . . consider charges brought against . . . (an) individual, provided that person has been notified in writing by the governmental body at least forty-eight hours prior to the proposed executive session."

"A meeting of a governmental body may be recorded by any person in attendance by means of a tape recorder. . . . A governmental body shall maintain accurate records . . . including executive sessions.

The Attorney General shall enforce this section. . . ."

M.G.L. c. 30A, §11(1)

(In pertinent part)

"Reasonable notice of the hearing shall be accorded all parties. . . ."

M.G.L. c. 66, §5A

(In pertinent part)

. "The records required to be kept by 11A, c. 30A . . . shall report the names of all members of such board or commission present, the subjects acted upon, and shall record exactly the votes and other official actions taken. . . ."

M.G.L. c. 66, §6

(In pertinent part)

"Every department . . . commission, or office of the Commonwealth . . . for which no clerk is otherwise provided by law, shall designate some person as clerk, who shall enter all of its votes orders or proceedings in books and shall have the custody of such books . . . and shall designate an employee to have custody of its other public records. Every sole officer in charge of a department . . . shall have the custody."

M.G.L. c. 167, §2

(In pertinent part)

"He may also, when he considers it expedient, appoint individuals certified as real

estate appraisers by the Society of Appraisers or similar successor society, to make, at the expense of the bank, appraisals of real estate securing loans of the bank, and, at the time he names such appraiser, he shall so notify the bank and advise it of the date on which he has requested submission of the appraisal report to him."

M.G.L. c. 214, §1B

(In pertinent part)

"A person shall have a right against unreasonable, substantial or serious interference with his privacy. . . ."

M.G.L. c. 214, §3B

"Any holder (plaintiff's note: both the Commissioner of Banks and Central Bank are holders) . . . which violates any provision of M.G.L. c. 66A, shall be liable to any individual who suffers damages as a result of such violations . . . such holder shall be liable for exemplary damages of not less than 100 dollars for each violation and reasonable attorney's fees." *See Swartz v. Dept. of Banking and Insurance*, ____ Mass. ____, 382 N.E. 2d 1050 (1978).

Regulations of the Division of Banks, Sec. 1

"1. In every adjudicatory proceeding, a reasonable notice shall be given to (a) the specifically named persons whose legal rights, duties or privileges are being determined by the proceeding; (b) any person who as a matter of constitutional right . . . is entitled to participate in the proceeding; (c) any other person who may be so substantially and specifically affected by the

proceeding that the Commissioner determines should be notified; and (d) counsel of record, if any. The notice shall be given at least ten days before any hearing is held.

2. The notice of the proceeding shall cite the authority of the Commissioner to act as he proposes, shall state the time, place and date of the hearing and shall contain a clear and concise statement of the issues involved sufficient to enable parties to prepare and present evidence and argument. . . .

3. The notice shall advise each person (a) that he may, but not need, be accompanied by counsel; (b) that each party may subpoena witnesses and documents for presentation at the hearing; (c) the hearing shall be conducted in accordance with sections 10 and 11 of chapter 30A of the General Laws.

4. In order that all parties may enjoy their right to a full and fair hearing as guaranteed by section 10 and 11 of chapter 30A of the General Laws, no party to any proceeding in which the interests of two or more parties (in addition to this agency), may in any way conflict, shall without the prior consent of the Commissioner and all other parties to the proceeding, directly or indirectly, communicate outside the hearing with any agency member or the Commissioner concerning the merits of the proceeding."

F.R.C.P. Rule 44

(In pertinent part)

". . . The certificate may be made . . . by the officer having legal custody of the record, or by his deputy, and accompanied by a certificate that such officer has the custody. . . ."

Appendix G

Rule 56(c)

". . . When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing there is genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

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CLERK

No. 80-2071.

In the Supreme Court of the United States.

OCTOBER TERM, 1980.

ROSLINDALE CO-OPERATIVE BANK, ET AL.,
PETITIONERS,

v.

CAROL S. GREENWALD, ET AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Brief of Central Bank Respondents in Opposition.

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The respondents The Co-operative Central Bank and its individual officers and directors, defendants below, submit this brief in opposition to the petition for certiorari filed by the petitioners, Roslindale Co-operative Bank and its individual officers and directors, and respectfully request that the petition for certiorari be denied.

Counterstatement of Questions Presented.

1. Whether the Court of Appeals and the District Court were correct in holding that, under Massachusetts law, the opportunity afforded the plaintiffs to obtain judicial review of the defendant Bank Commissioner's decision to appoint a receiver for the plaintiff Roslindale Co-operative Bank satisfied due process?
2. Whether the Court of Appeals and the District Court were correct in holding that Mass. G.L. c. 167, § 5, the bank officer removal statute, is on its face constitutional?
3. Whether the Court of Appeals and the District Court were correct in holding that the proceedings initiated by the defendant Commissioner of Banks to remove certain of the plaintiffs from their offices in the plaintiff Bank pursuant to Mass. G.L. c. 167, § 5 satisfied due process?

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Jurisdiction.

The judgment of the United States Court of Appeals for the First Circuit was entered on November 21, 1980, affirming a judgment of the United States District Court for the District of Massachusetts dated April 16, 1980. Upon consideration of various post-decision motions, the First Circuit entered a final order on February 11, 1981 denying the petitioners' motion to recall mandate. On April 7, 1981, Mr. Justice Brennan signed an order extending the time for the petitioners to file a petition for a writ of certiorari to and including June 7, 1981.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

Opinions Below.

The amended opinion of the United States Court of Appeals for the First Circuit (Pet. 5a) is reported at 638 F.2d 258 (1981). The opinion of the United States District Court for the District of Massachusetts on the defendants' motions to dismiss (Pet. 15a) is reported at 481 F.Supp. 749 (1979). A subsequent opinion of the United States District Court for the District of Massachusetts on the defendant Greenwald's motion for summary judgment is unreported (Pet. 11a).

Statutes Involved.

The statutory provisions involved are set forth in Appendix A to this brief.

Counterstatement of the Case.

This purported civil rights action was brought by the petitioners Roslindale Co-operative Bank and eleven of its officers and directors (the "petitioners") against the Massachusetts Commissioner of Banks, The Co-operative Central Bank (the statutory deposit insurer and receiver of all co-operative banks), and twenty-odd other individuals for actions arising out of the Commissioner's decision of October 28, 1977 to put the management of Roslindale's affairs under the statutory receivership of the Central Bank. Mass. G.L. c. 170 App. § 2-4.[1] During the pendency of this action, the Commissioner commenced independent proceedings to remove and did remove four of the individual petitioners (all members of the Security [*i.e.*, loan approval] Committee of Roslindale's Board of Directors) from office pursuant to Mass. G.L. c. 167, § 5 for unsafe and unsound banking practices.

The petitioners filed three amendments to their complaint — all of which were allowed by the District Court on July 2, 1979 (Pet. 21a). On December 7, 1979, the District Court granted in their entirety the motions to dismiss which had been filed by all defendants except for certain claims made by four individual petitioners against former Commissioner of Banks Greenwald (Pet. 15a-28a). Greenwald then answered the remaining claims and filed a motion for summary judgment accompanied by an affidavit and extensive exhibits. On

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[1] There are two special acts of the Massachusetts Legislature relevant to this petition. Mass. St. 1932, c. 45, the "Central Bank Act," and Mass. St. 1934, c. 73, the "Share Insurance Fund Act." The petitioners and the Courts below have all cited to these acts as they are reprinted in the West Massachusetts General Laws Annotated where they are codified respectively as Mass. G.L. c. 170, App., §§ 1-1 through 1-11 and Mass. G.L. c. 170 App., §§ 2-1 through 2-16. This brief will cite to those acts as reprinted in the West Annotated Massachusetts statutes.

March 25, 1981, the District Court granted Greenwald's motion for summary judgment (Pet. 11a-14a). After a final judgment was entered in the District Court on April 16, 1980, an appeal to the First Circuit followed. The First Circuit affirmed the decision of the District Court in an unpublished opinion issued November 21, 1980 (Pet. 5a). After reconsideration of its decision prompted by a request from the petitioners, the First Circuit made a minor amendment to its decision and released its revised opinion for publication on January 8, 1980 (Pet. 5a-10a). That decision held that: (1) the Massachusetts co-operative bank receivership law did not unconstitutionally violate due process of law because any decision of the Commissioner of Banks to appoint a receiver for the petitioner Roslindale Co-operative Bank was subject to adequate judicial review under other provisions of Massachusetts law; (2) the Massachusetts bank director removal statute, Mass. G.L. c. 167, § 5, on its face did not unconstitutionally violate due process of law; and (3) the proceedings by which the defendant Commissioner of Banks removed four of the individual petitioners from office under Mass. G.L. c. 167, § 5 were constitutionally adequate and not violative of due process.

Counterstatement of Facts.

The underlying facts relevant to this petition are relatively simple and relate to two largely separate chains of events. The petitioner Roslindale Co-operative Bank is a co-operative bank organized under Mass. G.L. c. 170.[2] Albert G. Tobin is its president and it has (or had) twelve individual directors

[2] Massachusetts co-operative banks are state-chartered, mutually owned thrift institutions. Their management is elected by their respective shareholders. In most other states, such institutions are denominated savings and loan associations.

(Pet. 6a).[3] On October 28, 1977, Carol Greenwald, then the Massachusetts Commissioner of Banks, acting pursuant to Mass. G.L. c. 170 App., § 2-4, certified to The Co-operative Central Bank (the "Central Bank") that it appeared to her "unsafe and inexpedient for the Roslindale Co-operative Bank to continue to transact its business" (Pet. 5a). As provided by that statute, the Central Bank promptly took possession and control of the Roslindale Bank's property and business and assumed the managerial duties of its officers and directors (Pet. 6a). On November 2, 1977, the petitioners were notified by letter of both the Commissioner's and the Central Bank's actions (Pet. 6a). The Roslindale Co-operative Bank and its president, A. Tobin, took an appeal of the Commissioner's actions to the Massachusetts courts which was dismissed without prejudice "on valid non-pretextual grounds" (Pet. 6a, 8a). *Tobin* v. *Commissioner of Banks*, 377 Mass. 909, 386 N.E.2d 1246 (1979). At the present, the Roslindale Bank remains under the control of the Central Bank.

Approximately one year after the certification, the Commissioner began administrative proceedings to remove five directors from the Roslindale Bank's Board of Directors for engaging in unsafe and unsound banking practices as provided by Mass. G.L. c. 167, § 5 (Pet. 6a). One of the five then voluntarily resigned (Pet. 6a). The Commissioner held a show cause hearing in connection with this removal proceeding which, as provided by statute, was also attended by a three-member board consisting of designees of the Attorney General, the State Treasurer and the Commissioner of Revenue (Pet. 6a). The complete thirteen-volume transcript of that hearing was filed with the District Court by the Commissioner (Pet. 12a). The four individual petitioners received at least a

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[3] As discussed below, four directors have been removed and one voluntarily resigned prior to the initiation of removal proceedings pursuant to Mass. G.L. c. 167, § 5.

month's formal notice of the hearing and were given a bill of particulars even before then (Pet. 9a). After a postponement made at the directors' request, the hearing began on December 8, 1978, and lasted for ten (10) days (Pet. 13a). Much of the first six days was taken up by the four individual petitioners' cross-examination of the witnesses produced by the State Banking Division and by lengthy diatribes charging persecution of them by the Division (Pet. 9a, 12a-13a). During the remaining four days the plaintiffs called five witnesses. The hearing closed with rebuttal testimony by a Banking Division witness and closing arguments by both sides (Pet. 12a). On January 4, 1979, the Commissioner of Banks issued a 56-page decision summarizing the evidence against the four directors and citing numerous infractions, including violation of state banking laws, the conducting of the Roslindale Bank's business in an unsafe and unsound manner, negligence in the performance of their duties as directors, and use of their official positions in a manner contrary to the Bank's interest (Pet. 6a). She therefore removed all four as directors of the Roslindale Bank (Pet. 6a).

The Commissioner's decision was upheld by the statutory board in an opinion issued a week later (Pet. 6a).[4]

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[4] Although not apparent from the appendices to the petition, the four individual petitioners have claimed an appeal of the Commissioner's and the Board's removal decision to the state court. Mass. G.L. c. 167, § 5. That appeal is presently pending. *Tobin* v. *Commissioner of Banks*, Suffolk Superior Court, Civil Action No. 33144. The petitioners have also filed a declaratory judgment action to obtain judicial review of the Commissioner's October 28, 1977 decision to certify Roslindale Co-operative to the Central Bank as unsafe. *Roslindale Co-operative Bank* v. *Greenwald*, Suffolk Superior Court, Civil Action No. 44846. That action is also pending in the state trial court.

Summary of Argument.

The Court of Appeals properly concluded that the availability of judicial review for a discretionary decision by the respondent Commissioner of Banks to appoint the respondent Central Bank receiver of the petitioner Roslindale Co-operative Bank adequately protected the petitioner Roslindale's constitutional right to due process of law (pp. 6-9). The Court also correctly ruled that (a) Mass. G.L. c. 167, § 5, the Massachusetts bank officer removal statute, was constitutionally adequate on its face and (b) the procedures used to remove four of the petitioners under that statute were constitutionally adequate (pp. 9-12).

Reasons for Denying the Writ.

I. THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW RAISED BY THE LOWER COURT DECISION WHICH SHOULD BE SETTLED BY THIS COURT.

A. *The Court of Appeals Properly Concluded that the Procedural Remedies Available to the Petitioner Roslindale Co-operative Bank in Connection with the Commissioner's Decision to Put it into Receivership Adequately Protects any Constitutional Rights Involved.*

Assuming, as did both courts below, that petitioner Roslindale Co-operative Bank has a constitutionally protected property interest in the management of its affairs, there are only two constitutional questions relating to the Commissioner's decision to appoint the Central Bank receiver of Roslindale's affairs. First, did the Bank have a constitutional right to a hearing prior to the receivership? Second, if there is no such right to a prior hearing, are the procedures available to the petitioner Roslindale under Massachusetts law to challenge the

receivership sufficiently protective of the petitioner Roslindale's due process rights?

The answer to the first question is simple. As the First Circuit noted:

> The Bank's claim that it was entitled to a hearing prior to certification is effectively disposed of by one of the authorities it cites. Fahey v. Mallonee, 1947, 332 U.S. 245, 253-54; Coffin Bros. v. Bennett, 1928, 277 U.S. 29; Federal Deposit Ins. Corp. v. American Bank Trust Shares, 4 Cir., 1980, 629 F.2d 951. The drastic consequences of bank failure or mismanagement and 'the impossibility of preserving credit during an investigation,' Fahey, ante, 332 U.S. at 253, call for prompt and decisive action and place this proceeding among the 'extraordinary situations' in which notice and hearing may be postponed until after seizure. Fuentes, ante, 407 U.S. at 90-91 & n.23.

(Pet. 8a.)

As to the second question, the answer is no more difficult. In a case involving the petitioners Roslindale and Albert Tobin, the Massachusetts Supreme Judicial Court held that Mass. G.L. c. 231A, "The Declaratory Judgment Act", afforded the petitioners a vehicle by which they could obtain judicial review of the Commissioner's decision to appoint the Central Bank as receiver of Roslindale's assets. *Tobin* v. *Commissioner of Banks*, 377 Mass. 909, 386 N.E.2d 1246 (1979). Relying on this opinion, both courts below concluded that the availability of judicial review pursuant to the Massachusetts Declaratory Judgment Act "meets all the requirements of due process in the context of bank certification." (Pet. 24a; Pet. 8a.[5])

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[5]For reasons known only to the petitioners, they did not pursue the declaratory judgment remedy which the Massachusetts Supreme Judicial

The availability of such judicial review, which would test the Commissioner's action against the statutory requirements for bank certification set out in Mass. G.L. c. 170 App., § 2-4, is fully adequate to protect any property interests belonging to the petitioners. *Fahey* v. *Mallonee*, 332 U.S. 245, 252-253 (1947); *Federal Deposit Insurance Corporation* v. *American Bank Trust Shares*, 629 F.2d 951 (4th Cir. 1980).

As the First Circuit correctly concluded:

> The availability of the statutory proceedings satisfied the requirements of due process. Federal Deposit Ins. Corp. v. American Bank Trust Shares, ante. We cannot be sympathetic to a party who elects to forego the hearing provided him, and then complains he received none. This is not a case of an invasion of plaintiffs' substantive rights, where they would have the opinion of seeking federal rather than state redress. Monroe v. Pape, 1961, 365 U.S. 167, 183. Rather, their complaint is lack of due process, viz., the absence of a hearing. Since a sufficiently timely hearing was available to them, they cannot bootstrap themselves into the federal court by failing to seek it.

(Pet. 8a-9a.)

The fact that the petitioners have apparently decided to voluntarily forego exercise of that right cannot serve to boot-

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Court said they had in its April, 1979 *Tobin* opinion until October, 1980 — some eighteen months later. See footnote 3, *supra*. Thus, the only reason why the petitioners have not had the judicial review or process which they claim they desire is due solely to their inability or unwillingness to file a proper declaratory judgment action in the state courts. The fact that they have done so since the time their appeal to the First Circuit was argued probably moots this petition.

strap them into a position to claim that they have been denied procedural due process. A number of other 42 U.S.C. § 1983 cases have held that persons asserting denial of procedural due process have an obligation to pursue available state procedures that might moot such a claim.[6] *See, e.g., Toney* v. *Reagan*, 467 F.2d 953, 956 (9th Cir. 1972); *Elmwood Properties, Inc.* v. *Conzelman*, 418 F.2d 1025, 1027 (7th Cir. 1969); *Randell* v. *Newark Housing Authority*, 384 F.2d 151, 156 (3d Cir. 1967); *Klotz* v. *Consolidated Edison Co. of New York, Inc.*, 386 F.Supp. 577, 586 (S.D. N.Y. 1974); *Light* v. *Blackwell*, 472 F.Supp. 333, 336 (E.D. Ark. 1979).

B. *The Court of Appeals Correctly Ruled that Mass. G.L. c. 167, § 5, "The Bank Removal Statute," was on its Face Constitutional.*

There can be no serious question that the procedural protections afforded the four removed director petitioners by statute, on their face, fully provide the directors with due process. *See Rodriguez de Quinonez* v. *Perez*, 596 F.2d 486, 491 (1st Cir.

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[6] The respondents do not argue that remedies must always be exhausted in a § 1983 case, although they note "the unsettled state of the law in this area." *Burns* v. *Sullivan*, 619 F.2d 99, 107 n.14 (1st Cir. 1980) comparing *Gibson* v. *Berryhill*, 411 U.S. 564, 574-575 (1973) with *Ellis* v. *Dyson*, 421 U.S. 426, 432-433 (1975). However, in a case where a plaintiff claims to have been denied procedural due process at a stage when procedural avenues are still open to him, the constitutional "injury" has not, in fact, yet occurred. *Toney* v. *Reagan*, *supra*, 467 F.2d at 956. In such cases, a plaintiff is obligated to avail himself of those remedies which may serve to moot his claim of lack of due process. Moreover, such a requirement is consistent with "recognition of the primacy of viable . . . dispute resolution mechanisms." *Burns* v. *Sullivan*, *supra* at 107 n.14. Furthermore, one must keep in mind that in enacting § 1983, the "Congressional purpose was not to replace state courts with federal ones, but was to provide a federal remedy for official misconduct in situations where the state procedures had proved inadequate." *Egner* v. *Texas City Independent School District*, 338 F.Supp. 931, 935 (S.D. Tex. 1972).

1979) (directors are entitled to "notice of the charges against them and a reasonably prompt post-termination hearing"). Massachusetts General Laws c. 167, § 5 provides that the Commissioner must offer bank directors a hearing before removing them and provides for administrative review of that hearing by the special statutory review board described above. Furthermore, removed directors have a right to seek judicial review of their removal in the Supreme Judicial Court pursuant to Mass. G.L. c. 167, § 5, par. 2 and Mass. G.L. c. 30A, § 14(8) ("The Massachusetts Administrative Procedure Act"). As the Court of Appeals noted, Mass. G.L. c. 167, § 5 is a "constitutionally generous" statute and the petitioners' "facial attack is frivolous" (Pet. 9a).

C. *The Court of Appeals Correctly Ruled that the Proceedings Initiated by the Commissioner of Banks to Remove Certain of the Petitioners from Their Offices in the Petitioner Bank Pursuant to Mass. G.L. c. 167, § 5 Satisfied Due Process.*

There only remains the four individual petitioners' claim against the respondent Commissioner that their removal hearing was conducted in a manner that effectively negated the procedural protections given to them by Mass. G.L. c. 167, § 5. *Cf. Codd* v. *Velger*, 429 U.S. 624, 626-627 (1977). This narrow issue was the only matter as to which the District Court did not grant the respondents' motions to dismiss (Pet. 27a). The District Court subsequently granted the Commissioner's motion for summary judgment (Pet. 11a-14a). The Court of Appeals affirmed. One need look no further than the discussion of the Court of Appeals on this point to determine the propriety of the grant of the respondent Commissioner's summary judgment motion.

There remains only plaintiff's contention that defendant Greenwald so conducted the proceeding as to deny them a fair opportunity to be heard. This claim survived defendants' motion to dismiss. 481 F.Supp. at 755-56. In support of her subsequent motion for summary judgment, Greenwald submitted her affidavit, together with the record of the proceedings. The affidavit summarized the course of events and denied any animus toward the plaintiffs. The record amply refutes the directors' allegations that they were given inadequate notice (a month's formal; nearly two months' informal), and access to evidence and the opportunity to cross-examine witnesses. It also sheds light on their contention that none of the discharged directors was allowed to take the stand except Albert Tobin, who was allowed only one hour. Plaintiffs were repeatedly told they would have four days following the Division's presentation to put on their substantive case. They waited until the fourth day of their witnesses to complain that they themselves had not been heard. The hearing was extended through the following morning; plaintiffs continued with another witness until 11:30 A.M., when Albert Tobin took the stand. His testimony consisted of a 96 page document which he submitted as his statement for the record. None of the others testified. The record abundantly demonstrates that plaintiffs received an adequate opportunity to be heard. How they chose to exercise it was their affair.

Finally, we are surprised, in the light of evidence, that plaintiffs could think they had legitimate complaints against the Commissioner's findings of mismanagement, self-dealing and illegality. The affidavits of Albert Tobin, to the extent that they purport to bear on the issues, are merely conclusory reiterations of the allegations of the complaint, and even at that are often not made on personal knowledge. They are insufficient.

F.R.Civ.P. 56(e). Plaintiffs have failed to show the existence of any genuine issue for trial, and summary judgment was rightly entered.

(Pet. 9a-10a.)

II. The Decision of the Court of Appeals does Not Conflict with Any Decision of This Court.

The petitioners prolix brief fails to demonstrate that the decision of the Court of Appeals is in conflict with any decision of this Court. In absence of such conflict, the petition must be denied. Rule 17.1(c), United States Supreme Court Rules.

Conclusion.

The petition for certiorari must be denied.

Respectfully submitted,

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Dated: July 8, 1981

Appendix A.

MASS. G.L.A. C. 170 APP., § 2-4.

(In Effect on October 28, 1977)

§ 4. Taking Possession of Member Banks by Corporation.

"Whenever it shall appear to the commissioner that any member bank is in an unsound or unsafe condition to transact the business for which it is organized, or that it is unsafe and inexpedient for it to continue to transact such business, he may so certify to the corporation, and upon receipt of such certificate the corporation shall, by notice in writing to the commissioner and to the bank, take possession and control forthwith of the property and business of such bank and shall operate such bank subject to such rules and regulations as the commissioner may impose until the bank shall resume business or until its affairs shall finally be liquidated. The corporation may, while thus carrying on such business, pay to such bank out of the Share Insurance Fund such sums as the corporation's directors deem necessary for the protection of the bank's shareholders, and may order the same to be repaid when no longer required for that purpose, or may purchase assets from said bank to effect the purposes of this chapter on such terms and conditions and at such valuations as the directors, with the approval of the commissioner, may determine." (1934, 73, § 4.)

MASS. G.L.A. c. 167, § 5.

Commissioner May Report and Prosecute Violations of Law; Publication of Certain Facts.

(In Effect in 1977 and 1978)

"If, in the opinion of the commissioner, any officer of any bank, including a director or trustee thereof, has violated any law relating to such bank or has conducted the business of such bank in an unsafe or unsound manner or has used his official position in a manner contrary to the interests of such bank or its depositors or has been negligent in the performance of his duties, the commissioner may, in his discretion, send a statement of facts about such conduct to the executive officer, and each director or trustee of the bank affected. Within such reasonable time as the commissioner may direct, a special meeting of the directors or trustees of the bank shall be held with respect to the statement of the commissioner. If, in the opinion of the commissioner, appropriate action is not taken to protect the interests of the bank or its depositors, or if such conduct is continued, the commissioner shall cause notice to be served on such officer, director or trustee to appear, and show cause why he should not be removed from office. A copy of such notice shall be sent by registered mail to each officer, director or trustee of the bank affected. A copy of such notice shall be sent to a board composed of the state treasurer, the attorney general, and the commissioner of revenue. The members of the board or a duly authorized representative shall be present at any appearance of such officer, director or trustee. If, after granting the officer, director or

trustee so summoned as reasonable opportunity to be heard, the commissioner finds that he has been guilty of any such delinquency, the commissioner, in his discretion, may order that such officer, director, or trustee be removed from office and from participation in the management of such bank. A decision by the commissioner to remove such officer, director or trustee may be reversed by a decision of the majority of the members of the board made within five business days after the commissioner's decision to remove; otherwise, any such decision of the commissioner shall be given full force and effect. Copies of such order shall be served upon the delinquent officer and upon such bank, whereupon such officer shall cease to be an officer of such bank and shall no longer participate in any way in the management thereof provided, that such order and the findings of fact upon which it is based shall not be made public or disclosed to anyone except the delinquent officer and the other officers, directors and trustees of such bank, otherwise than in the course of any judicial proceeding under this section. The commissioner shall thereupon transmit to the attorney general a transcript of the evidence and finding, and the attorney general shall, on behalf of the commonwealth, institute such proceedings as he may deem necessary. Any person removed from office as herein provided who thereafter participates in any manner in the management of any bank in the commonwealth shall be punished by imprisonment in the state prison for not more than five years or by a fine of not more than five thousand dollars, or both.

Within twenty days after the service of an order of removal under this section upon the person removed thereby, he may file a petition in the supreme judicial court for the county of Suffolk for a review of the removal but,

pending such review, the order shall remain in full force and effect. The court shall have jurisdiction in equity to annul, reverse or affirm such order, shall review all questions in accordance with the standards for review provided in paragraph (8) of section fourteen of chapter thirty A and may make any appropriate order or decree. The decision of the court shall be final and conclusive."